

REGULATION OF ATTORNEYS PRACTICING BEFORE FEDERAL AGENCIES

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Attorneys practicing before federal agencies currently are regulated in a variety of ways. Traditionally, state bar counsel and licensing authorities regulate attorneys; however, several federal agencies have begun to regulate attorneys practicing before them. This Article examines the current regulatory schemes and the numerous alternatives proposed by the American Bar Association and others. The author initially determines that federal agencies have authority to regulate attorneys. To analyze the problems surrounding agency regulation, the author examines three aspects of supervision: admission requirements, standards of conduct, and discipline. While discussing these areas, the author proposes several amendments to the Agency Practice Act and the Ethics in Government Act. He advocates that Congress vest authority to set standards of conduct in the Office of Government Ethics and that the federal district courts adjudicate most cases of attorney misconduct.

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INTRODUCTION

SINCE THE 1930's, Congress and governmental and nongovernmental entities have addressed the regulation of attorneys practicing before federal agencies on a number of occasions.¹ Section 6(a) of the Administrative Procedure Act details an individual's right to counsel when appearing before an administrative agency;² however, the Act is silent on regulation of attorneys themselves.³ The *Attorney General's Manual on the Administrative Procedure Act*⁴ explains that "the legislative history [of section 6(a)] leaves no doubt that the Congress intended to keep unchanged the agencies' existing powers to regulate practice before

1. In addition to enactment of the Agency Practice Act, Pub. L. No. 89-332, 79 Stat. 1281 (1965) (codified as amended at 5 U.S.C. § 500 (1982)), Congress has considered numerous other bills. See, e.g., S. 262, 96th Cong., 1st Sess., 125 CONG. REC. 1408 (1979); S. 2374, 86th Cong., 1st Sess., 105 CONG. REC. 13,161 (1959); H.R. 7092, 86th Cong., 1st Sess., 105 CONG. REC. 8009 (1959); H.R. 6774, 86th Cong., 1st Sess., 105 CONG. REC. 7107 (1959); S. 600, 86th Cong., 1st Sess., 105 CONG. REC. 873 (1959); H.R. 7006, 85th Cong., 1st Sess., 103 CONG. REC. 5947 (1957); S. 932, 85th Cong., 1st Sess., 103 CONG. REC. 1063, 1650 (1957); H.R. 3350, 85th Cong., 1st Sess., 103 CONG. REC. 858 (1957); H.R. 3349, 85th Cong., 1st Sess., 103 CONG. REC. 858 (1957); H.R. 8201, 81st Cong., 2d Sess., 96 CONG. REC. 5749, 9729, 11225, 11887 (1950); H.R. 4446, 81st Cong., 2d Sess., 96 CONG. REC. 1987, 3420 (1950), 1st Sess., 95 CONG. REC. 5382, 8400, 8954 (1949); S. 746, 81st Cong., 1st Sess., 95 CONG. REC. 671 (1949); H.R. 7100, 80th Cong., 2d Sess., 94 CONG. REC. 9785 (1948); H.R. 2657, 80th Cong., 1st Sess., 93 CONG. REC. 2343 (1947); H.R. 3089, 79th Cong., 1st Sess., 91 CONG. REC. 4038 (1945); S. 740, 79th Cong., 1st Sess., 91 CONG. REC. 2168 (1945); S. 572, 79th Cong., 1st Sess., 91 CONG. REC. 1211 (1945); H.R. 1387, 79th Cong., 1st Sess., 91 CONG. REC. 230 (1945); H.R. 1206, 79th Cong., 1st Sess., 91 CONG. REC. 126 (1945); S. 92, 79th Cong., 1st Sess., 91 CONG. REC. 78 (1945); H.R. 643, 79th Cong., 1st Sess., 91 CONG. REC. 29 (1945); H.R. 339, 79th Cong., 1st Sess., 91 CONG. REC. 23 (1945); H.R. 5277, 78th Cong., 2d Sess., 90 CONG. REC. 7481 (1944); H.R. 5237, 78th Cong., 2d Sess., 90 CONG. REC. 7302 (1944); S. 1945, 78th Cong., 2d Sess., 90 CONG. REC. 4844 (1944); H.R. 4470, 78th Cong., 2d Sess., 90 CONG. REC. 3028 (1944); H.R. 2323, 78th Cong., 1st Sess., 89 CONG. REC. 2670 (1943); H.R. 94, 78th Cong., 1st Sess., 89 CONG. REC. 19 (1943); H.R. 2526, 77th Cong., 1st Sess., 87 CONG. REC. 223 (1941); H.R. 605, 77th Cong., 1st Sess., 87 CONG. REC. 16 (1941); H.R. 4798, 76th Cong., 1st Sess., 84 CONG. REC. 2331 (1939); H.R. 9635, 75th Cong., 3d Sess., 83 CONG. REC. 2485 (1938); S. 2944, 74th Cong., 1st Sess., 79 CONG. REC. 8366, 11275, 12063 (1935); see also Ethics in Government Act, § 501(a), 18 U.S.C. § 207 (1982) (disqualifying former federal and District of Columbia officers and employees from and establishing penalties for participation in agency, judicial, and military matters in which they previously participated as government officers or employees). See *infra* note 122, for a discussion of the 96th Congress' consideration of S. 262. For a summary of the ABA's activity during this time, see *infra* notes 8 & 10.

2. 5 U.S.C. § 555(b) (1982).

3. *Id.* §§ 551-59.

4. U.S. DEPT OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT (1947) [hereinafter cited as APA MANUAL]. The Supreme Court gives "some deference [to the *Manual*] because of the role played by the Department of Justice in drafting the legislation . . ." *Steadman v. SEC*, 450 U.S. 91, 102-03 n.22 (1981) (quoting *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 546 (1978)).

them. [Congress decided that] the subject should be covered by separate legislation.”⁵

On August 11, 1982, the ABA House of Delegates considered two proposals relating to regulation of attorneys practicing before federal agencies. The ABA Standing Committee on Professional Discipline recommended one proposal,⁶ whereas ten organizations, including nine ABA affiliates, developed the second proposal, the Waxman/Forrest Proposal.⁷ The ABA's current interest in discipline of attorneys practicing before federal agencies surfaced in early 1979 but intensified on August 5, 1980 when its House of Delegates adopted the following resolution:⁸

5. APA MANUAL, *supra* note 4, at 65.

6. ABA Standing Comm. on Professional Discipline, Report to the House of Delegates (Aug. 1982) (on file with the *Case Western Reserve Law Review* and the ACUS) [hereinafter cited as Franck Proposal]. Michael Franck was the Chairman of the ABA Standing Committee during formulation of the proposal, which includes Rules for Federal Agency Discipline.

7. ABA Sections of Admin. Law, Natural Resources Law, & Pub. Util. Law, & Fed. Communications Bar Ass'n, Report to the House of Delegates (Aug. 1982) (on file with the *Case Western Reserve Law Review* and the ACUS) [hereinafter cited as Waxman/Forrest Proposal]. Margery H. Waxman and Herbert E. Forrest were the principal drafters of the proposal. During its development, Ms. Waxman was Deputy General Counsel, Department of the Treasury, and Mr. Forrest was a member of the Washington, D.C., law firm of Steptoe & Johnson Chartered. The following organizations helped develop the proposal: the ABA Sections of Administrative Law; Corporation, Banking and Business Law; Natural Resources Law; Patent, Trademarks and Copyright Law; Public Contract Law; Public Utility Law; and Taxation; the ABA Special Committee on Lawyers in Government; the ABA Judicial Administration Division; and the Federal Communications Bar Association.

8. The ABA has shown periodic interest in the regulation of attorneys practicing before federal agencies. *See, e.g.*, Letter from Edward W. Kuhn to Rep. Edwin Willis, U.S. Congress (Sept. 17, 1965) (endorsing Agency Practice Act), *reprinted in* 1965 U.S. CODE CONG. & AD. NEWS 4179; ABA, 81 REPORTS OF THE AMERICAN BAR ASSOCIATION 379-80, 495-96, 514-17 (1956) (endorsing Hoover Commission proposals). For further discussion of the Hoover Commission proposals, *see infra* note 20.

Discipline of attorneys practicing before federal agencies appeared on the agenda of the January 18-20, 1979 meeting of the ABA Standing Committee on Professional Discipline. An attorney disciplinary action before the Interstate Commerce Commission, *In re Vandegrift*, ICC ex parte No. 352 (Nov. 3, 1980), prompted this action. The Standing Committee noted its concern over the lack of uniformity in attorney disciplinary procedures among the various federal agencies, the ICC's apparent failure to provide respondent with due process, and the ICC's broad claim of authority over attorney discipline. *See also In re Carter*, [1979 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,175 (Mar. 7, 1979) (administrative law judge recommended suspension of two attorneys from SEC practice for violating Securities Exchange Act and engaging in unethical professional conduct), *rev'd and dismissed*, [1981 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,847 (Feb. 28, 1981).

At the April 20-21, 1979, meeting of the Standing Committee, discussion of agency regulation of attorneys included the *Vandegrift* case, concern over the Securities and Exchange Commission's actions and the implications of *Carter*, the authority of agencies to discipline attorneys, the standards applicable in attorney disciplinary actions by federal agencies, and the chilling effect of an agency's being both prosecutor and judge in a disci-

Resolved, That inasmuch as the public interest in the effective administration of justice requires diligent and independent representation by counsel, the American Bar Association perceives dangers in the exercise of disciplinary jurisdiction by administrative agencies over lawyers who represent clients with respect to client conduct subject to regulations by those agencies (other than authority immediately necessary to maintain order in or the integrity of proceedings pending before them); and

Resolved, That the American Bar Association undertake the development of a model enforcement mechanism for the discipline of lawyers who practice before federal and state administrative agencies, through efforts involving interested administrative agencies and Association entities, to be coordinated by the Standing Committee on Professional Discipline.⁹

Between the summer of 1980 and the summer of 1982, the Standing Committee developed the Franck Proposal,¹⁰ consisting primarily of proposed Rules for Federal Agency Discipline, forty-six pages of definitions, twenty-four rules, and commentary. In early 1982, ten organizations developed, circulated, refined, and endorsed an alternative to the Franck Proposal.¹¹ In addition to the ABA's organized attention to the subject, many individuals have addressed issues related to regulation of attorneys practicing before federal agencies.¹²

The recent interest in agency regulation of attorneys has focused attention on what federal agencies have or have not done to

plinary action. During the remainder of 1979, the Standing Committee prepared a recommendation on federal agencies' discipline of attorneys. After other ABA entities studied, discussed, and revised the recommendation, the ABA House of Delegates adopted it on August 5, 1980. See Letter & enclosures from Timothy K. McPike, Discipline Counsel, Standing Committee on Professional Discipline, to the author (May 25, 1982) (on file with the *Case Western Reserve Law Review* and the ACUS) (setting out this chronology of events); *infra* notes 9-10 and accompanying text.

9. ABA, *Reports of Committees and Commissions*, SUMMARY OF ACTION OF THE HOUSE OF DELEGATES, Aug. 5-6, 1980, at 23. The language finally adopted by the 1980 House of Delegates varies slightly from that initially recommended by the Standing Committee in its 1980 report to the House. See *infra* note 22.

10. The proposal represents a distillation of the views of a number of persons and organizations. The Standing Committee held three conferences in Washington, D.C., (Sept. 23, 1980; Dec. 16, 1980; and July 20, 1981) to obtain the participants' perspectives and comments on the proposed Rules for Federal Agency Discipline. In addition, it received responses from numerous individuals and entities, including submissions from several ABA sections, federal agencies, specialized bar associations, the Conference of Administrative Law Judges, and members of the National Organization of Bar Counsel. The Standing Committee submitted its final recommendation to the House of Delegates on August 11, 1982.

11. See Waxman/Forrest Proposal, *supra* note 7.

12. See *infra* appendix D.

warrant the increased opposition to agency regulation of attorneys. Many comments received by the author¹³ demonstrate the nature and depth of the bar's concern over this issue.¹⁴

To illuminate the ABA's and individual bar members' conflict with federal agencies, this Article analyzes the three aspects of agency regulation of attorneys: admission requirements,¹⁵ standards for regulating conduct,¹⁶ and discipline.¹⁷ Because the prac-

13. The author received comments while undertaking a study for the ACUS beginning on April 6, 1982. The study involved corresponding with numerous practitioners, law professors specializing in administrative law or professional responsibility, and current and past ACUS members. The author sent one questionnaire (the Federal Questionnaire) to the general counsels and chief administrative law judges of major federal agencies and a second questionnaire (the State Questionnaire) to all state bar counsel. See *infra* appendix A, for a copy of the Federal Questionnaire; *infra* appendix B, for a copy of the State Questionnaire. The responses are on file with the *Case Western Reserve Law Review*. When the author refers to an individual response to one of the questionnaires, he will refer the reader to the particular question containing that point in the response. As the information contained in the responses was not validated statistically, the responses only serve as an indication of the views of persons closely associated with disciplinary matters (State Questionnaire) or the federal administrative process (Federal Questionnaire). The author interviewed persons selected for their expertise and contrasting perspectives on discipline of attorneys practicing before federal agencies, and attended the ABA Annual Convention on August 11, 1982, to observe the House of Delegates' debate on the Franck and Waxman/Forrest Proposals. In addition, numerous persons furnished copies of correspondence, documents, and other materials relevant to the inquiry.

14. The following excerpts from two letters exemplify this concern:

We have only this week obtained from the [agency name deleted], under the Federal Privacy Act, the memorandum which formed the basis for the finding of probable cause. It is so vicious, and so wrong-headed in its legal analysis, that we hardly know whether to laugh or cry. It demonstrates anew the dangers of having disciplinary matters handled by bar counsel who are neither impartial nor familiar with the law in the area, and who are not only willing but eager to institute a public proceeding first, and to investigate later.

Letter from Thomas Lumbard to Marcia L. Proctor 1-2 (Jan. 12, 1979) (on file with the *Case Western Reserve Law Review* and the ACUS).

I have received information leading me to believe that one agency's disciplinary investigators and counsel encourage attorneys in [agency name deleted], handling unrelated matters in which lawyers who are under disciplinary investigation are opposing them, to look at the files in the disciplinary investigations. The [position of official deleted] was quoted to me as having said, urging a staff attorney to review the file on his adversary, "You should take advantage of every opportunity to learn about your opponent." The staff attorney declined the invitation in this instance, but was it the first time? Or the last?

So we are not just talking about a theoretical or imaginary conflict between regulatory prosecutive zeal and disciplinary confidentiality. The conflict is not just a potential one, inherent in the structure; it is real. That lawyers acting as agency bar counsel would countenance such shenanigans makes my blood boil.

Letter from Thomas Lumbard to Marcia L. Proctor (Sept. 19, 1979) (on file with the *Case Western Reserve Law Review* and the ACUS). Although the same person wrote both letters in 1979, other individuals expressed similar concerns about agency disciplinary procedures and practices to the author during the course of this study.

15. See *infra* notes 58-99 and accompanying text.

16. See *infra* notes 100-75 and accompanying text.

tice of law has traditionally been within the province of the states,¹⁸ the Article also examines the scope of the federal government's authority to impose restrictions on attorneys in the administrative process.¹⁹ In addition, the Article seeks to determine whether federal agencies have acted improperly in their regulation of attorneys and to present solutions to existing problems in this area.

I. AUTHORITY OF THE FEDERAL GOVERNMENT TO REGULATE ATTORNEYS PRACTICING BEFORE FEDERAL AGENCIES

As one examines the authority of the federal government to regulate attorneys practicing before federal agencies, one must ask why the federal government would want to assume responsibilities normally performed by state bar counsel and licensing authorities. One simple reason is that a jurisdictional gap exists in the discipline of attorneys practicing before federal agencies. As noted by the Hoover Commission Task Force:

An attorney practicing before Federal agencies may escape effective disciplinary action by the courts of his State because of his absence from that jurisdiction. Such an attorney in Federal administrative practice who moves to Washington, D.C., often cuts all ties with the State which has admitted him to the practice of law. Only in exceptional cases is such an attorney likely to be subject to disciplinary proceedings in that State for unprofessional conduct before Federal agencies in Washington. Moreover, disbarment proceedings will not be available against him in the District of Columbia where he is not a member of the bar of any trial court in the District. The result is a hiatus in the effective disciplining of many lawyers engaged in the administrative law practice.²⁰

17. See *infra* notes 174-217 and accompanying text.

18. See, e.g., *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 460-62 (1978); *In re Primus*, 436 U.S. 412, 438-39 (1978); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792-93 (1975); *Law Students Civil Rights Research Council v. Wadmond*, 401 U.S. 154 (1971).

19. See *infra* notes 20-57 and accompanying text.

20. UNITED STATES COMM'N ON ORG. OF THE EXECUTIVE BRANCH OF THE GOV'T, TASK FORCE ON LEGAL SERVS. & PROCEDURES, REPORT ON LEGAL SERVICES AND PROCEDURES 308 (1955) [hereinafter cited as HOOVER COMMISSION TASK FORCE REPORT]; see also UNITED STATES COMM'N ON ORG. OF THE EXECUTIVE BRANCH OF THE GOV'T, LEGAL SERVICES AND PROCEDURES 37-40 (1955) (describing ability of attorneys practicing before federal agencies to escape disciplinary action) [hereinafter cited as HOOVER COMMISSION REPORT]. To eliminate this "hiatus," the Hoover Commission included as recommendation 26:

An attorney-at-law who has the privilege of representation before any agency of the United States should be subject to disciplinary control (1) by a Federal Grievance Committee through proceedings in a United States district court, and

Although the Task Force made this statement in 1955, the Clark Committee reached the same conclusion in 1970²¹ and the ABA Standing Committee on Professional Discipline's 1980 report to the House of Delegates contained similar indications.²² The House of Delegates adopted the recommendation accompanying the latter report and asked the Standing Committee to develop "a model enforcement mechanism for the discipline of lawyers who practice before federal . . . agencies."²³ Thus, if the states effectively processed allegations of attorney misconduct before federal agencies, federal disciplinary actions arguably would be unnecessary. A possible exception would be when an attorney acted con-

(2) by each agency, with authority to suspend him from practice before that agency for not more than 1 year.

Id. at 40. For a description of the authority of the District of Columbia Court of Appeals Committee on Unauthorized Practice of Law to investigate persons not licensed to practice in the District, see *Simons v. Bellinger*, 643 F.2d 774, 775-76 (D.C. Cir. 1980).

21. ABA SPECIAL COMM. ON EVALUATION OF DISCIPLINARY ENFORCEMENT, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT 67-70 (June 1970) [hereinafter cited as CLARK REPORT].

22. ABA Standing Comm. on Professional Discipline, Report to the House of Delegates 4 (Aug. 1980) (on file with the *Case Western Reserve Law Review* and the ACUS) [hereinafter cited as 1980 ABA Standing Committee Report]. The report states:

Lawyer discipline has traditionally been left to the principal jurisdiction of the several states. But several potential problems arise in merely relying upon existing mechanisms for disciplinary enforcement to govern practice before administrative agencies, notably:

1. The extent to which state disciplinary agencies lack adequate staff and financial resources to serve as the principal vehicles for administering discipline over federal agency practitioners.
2. The extent to which the high degree of expertise often involved in administrative agency practice, and disciplinary matters arising therefrom, might require that the customary state agency structure be supplemented.

Id. at 5.

23. ABA, *Reports of Committees and Commissions*, SUMMARY OF ACTION OF THE HOUSE OF DELEGATES, Aug. 5-6, 1980, at 23; see *supra* notes 8-9 and accompanying text. In 1981 the General Counsel and Solicitor of the SEC agreed that effective regulation of attorneys practicing before federal agencies required some mechanism beyond state disciplinary proceedings. R. Ferrara & P. Gonson, Submission of the General Counsel and Solicitor of the Securities and Exchange Commission to the American Bar Association Standing Committee on Professional Discipline Concerning Discipline of Lawyers who Practice Before Federal Agencies 4-5 (Mar. 19, 1981) (on file with the *Case Western Reserve Law Review* and the ACUS) [hereinafter cited as Ferrara/Gonson Proposal]. The two officials noted that

state and local bar authorities traditionally have held—and still hold—the primary responsibility for the discipline of lawyers. However, as a growing number of lawyers engage in an essentially federal practice, there is a greater need for a complementary disciplinary authority that focuses primarily on federal practice. . . . [M]any state disciplinary authorities lack extensive budgets, staff, and federal practice expertise. It is fair to state that misconduct in federal practice may receive a low priority among the numerous competing local issues.

Id. at 4.

tumaciously during the course of an agency proceeding.²⁴ Since effective state regulation of attorneys practicing before federal agencies remains undocumented and a need exists for regulation,²⁵ one must determine whether federal agencies have authority to assume responsibility in this specialized attorney discipline area.

A. *Constitutional Arguments Against Federal Authority*

Observers have proffered two constitutional arguments concerning the federal government's lack of authority in this area. The first argument attacks the federal *government's* power to regulate²⁶ and the second challenges federal *agencies'* authority to regulate.²⁷

The first argument proceeds from the premise that only the state or federal judiciary may regulate attorneys; however, despite their quasi-judicial aspects, agencies are not courts and thus do not have inherent authority to regulate attorneys.²⁸ This argument then maintains that legislatures have no authority to regulate the legal profession except perhaps to aid the judiciary in the performance of its responsibility.²⁹ Finally, since the Constitution

24. Federal agencies could handle at least two other categories of misconduct. The first is when the attorney acts in a representative capacity but does not commit the misconduct in the physical presence of the agency. *See, e.g.,* *Koden v. United States*, 564 F.2d 228 (7th Cir. 1977); *Kivitz v. SEC*, 475 F.2d 956 (D.C. Cir. 1973). The second involves an attorney's failure to fulfill an agency's special concept of professional responsibility relating to its substantive regulatory responsibilities. *See, e.g.,* *SEC v. National Student Mktg. Corp.*, 457 F. Supp. 682 (D.D.C. 1978); *In re Carter*, [1981 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,847 (Feb. 28, 1981); ABA Subcomm. on Fed. Agency Discipline, Standing Comm. on Professional Discipline, Draft Position Paper at 1 (Oct. 1979) (on file with the *Case Western Reserve Law Review* and the ACUS) (suggesting these distinctions).

25. *See supra* notes 20-22 and accompanying text. In addition, the responses to the State Questionnaire from state bar counsel (state officials who investigate and process complaints against attorneys) suggest that state disciplinary systems may not effectively regulate attorneys practicing before federal agencies. *See infra* appendix B; *supra* note 13.

26. For a presentation of this argument, see Letter from Thomas Lombard to Senator John C. Culver 2 (Aug. 31, 1979) (on file with the *Case Western Reserve Law Review* and the ACUS).

27. *See, e.g.,* 1980 ABA Standing Committee Report, *supra* note 22, at 2-5; Franck Proposal, *supra* note 6, at ii-iii.

28. *See, e.g.,* *Camp v. Herzog*, 104 F. Supp. 134, 136 (D.D.C. 1952) (stating that authority to regulate attorneys appearing before agency is not an inherent power but one derived from legislative authority creating agency); *In re Keating*, Muething & Klekamp, [1979 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,124 at 81,993 (July 11, 1979) (Karmel, Comm'r, dissenting) (stating that absent specific legislative grant of authority to agency, attorney discipline is responsibility of judiciary).

29. *See Note, Representation of Clients before Administrative Agencies: Authorized or Unauthorized Practice of Law?*, 15 VAL. U.L. REV. 567, 584-599 (1981) (discussing four

does not expressly reserve the function of regulating attorneys to the federal government, the tenth amendment requires that the responsibility remain with the various states.³⁰

Under this analysis, the federal government has no authority to regulate attorneys practicing before federal agencies unless the article III courts exercise authority as part of their inherent powers. Despite the theoretical persuasiveness of this rationale, the federal courts or Congress are unlikely to disregard longstanding congressional³¹ and judicial precedent³² acknowledging the federal government's authority to regulate attorneys practicing before federal agencies.

The second constitutional argument principally maintains that vesting agencies with authority to regulate attorneys would constitute an impermissible combination of functions in violation of due process.³³ To a lesser extent, it claims that agency authority would unconstitutionally interfere with the attorney/client relationship so as to deny effective counsel.³⁴ The ABA Standing

theories of legislative power to regulate legal profession: judiciary and legislature have concurrent jurisdiction; legislature may pass laws to aid judiciary; legislature has no jurisdiction; and legislature is supreme, with judiciary secondary).

30. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

31. For express legislative grants of authority, see 31 U.S.C. § 1026 (1976) (Department of the Treasury); 35 U.S.C. §§ 31, 32 (1976) (Patent and Trademark Office); 43 U.S.C. § 1464 (1976) (Department of the Interior); *see also* Agency Practice Act § 3, 5 U.S.C. § 500(b), (d), (e) (1982) (providing general rules for practice before a federal agency).

32. *See, e.g.,* *Sperry v. Florida ex rel. Fla. Bar*, 373 U.S. 379 (1963); *Goldsmith v. United States Bd. of Tax Appeals*, 270 U.S. 117 (1926); *Touche Ross & Co. v. SEC*, 609 F.2d 570 (2d Cir. 1979); *Koden v. United States Dep't of Justice*, 564 F.2d 228 (7th Cir. 1977); *Herman v. Dulles*, 205 F.2d 715 (D.C. Cir. 1953); *Schwebel v. Orrick*, 153 F. Supp. 701 (D.D.C. 1957); *Camp v. Herzog*, 104 F. Supp. 134 (D.D.C. 1952); *Phillips v. Ballinger*, 37 App. D.C. 46 (1911); *Garfield v. United States ex rel. Stevens*, 32 App. D.C. 109 (1908); *infra* notes 56-57 and accompanying text (examining *Sperry* and *Goldsmith*).

33. The proponents of the argument contend that combining client regulatory responsibilities and disciplinary power over attorneys in the same agency creates an unconstitutional risk of bias in the administrative process in violation of the fifth amendment. *But see* *Hortonville Joint School Dist. No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. 482 (1976); *Larkin v. Withrow*, 421 U.S. 35 (1975).

34. *See, e.g.,* R. Karmel, Remarks to the 2nd Annual Corporate Counsel Seminar for In-House Counsel 19 (Mar. 6, 1980) (on file with the *Case Western Reserve Law Review* and the ACUS) (agencies' obligating attorney to serve public interests beyond and perhaps inconsistent with client's raises civil liberty questions). Commissioner Karmel seems to be connecting the right to effective counsel and the Bill of Rights. The sixth amendment guarantees the right to counsel in all *criminal* prosecutions. U.S. CONST. amend. VI. Because regulation of a client is not generally criminal in nature, the sixth amendment does not seem to require assistance of counsel throughout the administrative process. Due process could include the right to counsel in a noncriminal proceeding. This right is not, however,

Committee on Professional Discipline stated the argument concisely:

The merger of substantive and disciplinary jurisdiction in the same administrative agency poses a two-fold threat of serious harm to the client.

First, the lawyer's disclosures about the representation which are required to defend against the misconduct charges must be made, not to disciplinary counsel disinterested in the underlying client matter, but to employees of the client's adversary, the agency. The disclosures thus become available to the agency for use against the client in the underlying matter.

Second, the practitioner who knows that his/her ability to earn a living can be terminated by the very agency he was retained by the client to deal with or resist, may very well temper his/her representation—consciously or unconsciously—to a level of vigor and diligence less than the client's cause warrants, so as not to arouse the agency's displeasure against himself.³⁵

The first part of the argument is not easy to counter. In *Withrow v. Larkin*,³⁶ the Supreme Court addressed the separation of functions question. This landmark decision did not involve the

an inevitable requisite of administrative due process, although the right may exist by statute. See, e.g., Administrative Procedure Act, § 6(a), 5 U.S.C. § 555(b) (1982); see also Friendly, "Some Kind of Hearing," 123 U. PA. L. REV. 1267, 1287-91 (1975). The concern does not therefore seem to be of constitutional dimension but rather one of confidentiality and privilege.

When Commissioner Karmel made her remarks in 1980, she did not have the benefit of a major Supreme Court decision involving federal agencies and the corporate attorney/client privilege. In *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981), the Supreme Court noted that "[t]he attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. . . . Its purpose is to encourage full and frank communication between attorneys and their clients. . . ." Nowhere in the opinion did Justice Rehnquist elevate the issues discussed to a constitutional level. Since there is little authority to support the constitutional right to effective counsel before federal agencies, Congress is the proper entity to eliminate agency interference with the attorney/client privilege.

35. Franck Proposal, *supra* note 6, at ii-iii; see also Keating, Muething & Klekamp, [1979 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,124 at 81,993-94 (Karmel, Comm'r, dissenting) (Because of "the potential corruption of justice when an administrative agency with significant prosecutorial responsibilities has the power to sanction an adversary representing and advising a client[, the SEC] should not exercise disciplinary power against attorneys [except] to keep its proceedings orderly and dignified.").

The Standing Committee clarified the effective counsel aspect of the argument. It stated: "The administrative agency's claim of disciplinary power over the lawyer who represents the client with respect to the agency threatens the client with loss of access to the independent counsel and vigorous representation which is most needed when a citizen is confronted by the power of government." 1980 ABA Standing Committee Report, *supra* note 22, at 3.

36. 421 U.S. 35 (1975).

regulation of attorneys but concerned a state examining board empowered to supervise and discipline physicians. Although the Court unanimously sustained a combination of investigative and adjudicative responsibilities, the decision's rationale is relevant to the issues under consideration. The Court stated:

The contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication has a . . . difficult burden of persuasion to carry. . . .

That is not to say that there is nothing to the argument that those who have investigated should not then adjudicate. The issue is substantial, it is not new, and legislators and others concerned with the operations of administrative agencies have given much attention to whether and to what extent distinctive administrative functions should be performed by the same persons. . . . Within the Federal Government itself, Congress has addressed the issue in several different ways, providing for varying degrees of separation from complete separation of functions to virtually none at all. . . .

That the combination of investigative and adjudicative functions does not, without more, constitute a due process violation, does not, of course, preclude a court from determining from the special facts and circumstances present in the case before it that the risk of unfairness is intolerably high.³⁷

The Franck Proposal³⁸ seems to indicate that "special facts and circumstances" may exist so as to make the "risk of unfairness intolerably high" when an agency has substantive and disciplinary jurisdiction.³⁹ The second part of the constitutional argument flows from a perception that the combination of the substantive and disciplinary functions has such great potential for abuse that neither the attorney/client relationship nor vigorous and diligent representation can remain unaffected. Although the question whether the Supreme Court would find an improper commingling

37. *Id.* at 47, 51-52, 58.

38. *See supra* note 6.

39. Franck Proposal, *supra* note 6, at ii-iii. Chairman Franck expressed further concern:

[T]here are fundamental constitutional deficiencies in attempts to vest disciplinary jurisdiction over practitioners in administrative agencies which also exercise substantive jurisdiction over the clients those practitioners represent. In consequence, thereof, we believe that any agency discipline structure which permits such a merger of disciplinary jurisdiction over the practitioner and substantive jurisdiction over his client under any circumstances acquiesces in the potential for serious harm to essential client interests and is unacceptable.

Letter from Michael Franck to Margery H. Waxman and Herbert E. Forrest I (Mar. 16, 1982) (on file with the *Case Western Reserve Law Review* and the ACUS) [hereinafter cited as Franck Letter to Waxman & Forrest].

of functions in a particular agency under the *Withrow* standards might be interesting, the answer is subject to conjecture and, thus, would not assist this discussion.

A more relevant inquiry to the separation of functions issue is whether potential violations of constitutional rights are inherent in *any* combination of substantive and disciplinary jurisdiction or may result from the structure of particular agencies' disciplinary systems.⁴⁰ Congress has expressly delegated authority⁴¹ to regulate attorneys to the Patent and Trademark Office⁴² and to the Department of the Treasury.⁴³ Each of these agencies has well-established procedures for regulating attorneys and nonattorneys practicing before them.⁴⁴ Of interest is that the attorneys practicing before these agencies oppose the establishment of disciplinary mechanisms separate from these agencies.⁴⁵ The ability of two agencies to keep their substantive and disciplinary jurisdictions separated, at least to the extent to elicit support from those affected, seems to indicate that the problems perceived by the Franck Proposal are not inherent but structural.⁴⁶ If the problems

40. Myron C. Baum, a Washington, D.C., practitioner, placed in perspective the issues raised by the Franck Proposal. Baum questioned the imposition of a uniform disciplinary code on all federal agencies when only the SEC has attempted to regulate practitioners aggressively. He concluded that a separation of functions becomes imperative when one agency oversteps its bounds because such conduct paves the way for similar overreaching by other agencies. Letter from Myron C. Baum to Marie L. Garibaldi 1-2 (Jan. 6, 1982) (on file with the *Case Western Reserve Law Review* and the ACUS).

41. For examples of implied authority, see 15 U.S.C. § 78w(a)(1) (1982) (SEC), *upheld in* *Touche Ross & Co. v. SEC*, 609 F.2d 570 (2d Cir. 1979); 29 U.S.C. § 156 (1976) (NLRB), *upheld in* *Camp v. Herzog*, 104 F. Supp. 134 (D.D.C. 1952).

42. 35 U.S.C. §§ 31, 32 (1976). Although the name "Patent Office" appears frequently in judicial decisions and the United States Code, Congress changed the name to "Patent and Trademark Office" in 1975. Act of Jan. 2, 1975, Pub. L. No. 93-596, § 3, 88 Stat. 1949 (codified at 35 U.S.C. § 1 (1976)).

43. 31 U.S.C. § 1026 (1976); *see also* 43 U.S.C. § 1464 (1976) (granting express authority to Secretary of Interior).

44. *E.g.*, 37 C.F.R. § 1.341(a) (1983) (admission to Patent and Trademark Office); *id.* § 1.348 (suspension/disbarment; same); 31 C.F.R. § 8.1-.72 (practice before Treasury Department's Bureau of Alcohol, Tobacco, and Firearms); *id.* § 10.1-.75 (same; IRS).

45. The author has found little attorney criticism of the IRS's processing of attorney discipline cases. For an indication of the Patent and Trademark Office's performance, see Resolution 502-4 of the Patent, Trademark and Copyright Section of the American Bar Association, adopted by the section at the ABA's 1981 Annual Meeting (supporting continued authority in that office to regulate attorneys). SECTION OF PATENT, TRADEMARK AND COPYRIGHT LAW, 1982 COMMITTEE REPORTS 261 (1982).

46. Chairman Franck questioned the validity of this conclusion, stating:

While we acknowledge . . . that lawyers who practice before the Department of the Treasury and the United States Patent Office appear to be satisfied with the manner in which those agencies are currently carrying out their responsibilities, that seems to us to be no answer to the potential for abuse inherent in a merged

are structural, the concern should not be with the delegation of combined authority but rather with the separation of authority within a particular agency's structure.

B. *Express Versus Implied Authority*

A final argument regarding the authority of federal agencies to regulate attorneys involves the distinction between express and implied authority.⁴⁷ The basic hypothesis of this argument is that

structure. We believe that client interests require structural protection against potential abuses rather than mere reliance upon the good judgment of those who at the moment administer the system.

Franck Letter to Waxman & Forrest, *supra* note 39, at 1. Professor Robert Hamilton of the University of Texas School of Law responded to this argument by stating that the Franck Proposal "ignores the most basic conceptions about separations of functions within federal agencies that permit the agency to perform simultaneously adjudicative and prosecutorial functions without the latter infecting the former with bias or prejudice." Letter from Robert H. Hamilton to Herbert E. Forrest (May 12, 1980) (on file with the *Case Western Reserve Law Review* and the ACUS).

Chairman Franck attempted to diminish the significance of the Patent and Trademark Office's and the Treasury Department's successful separation of substantive and disciplinary functions by associating their current structure with current personnel. Franck Letter to Waxman & Forrest, *supra* note 39, at 1. Chairman Franck overlooked the following facts: (1) The Patent and Trademark Office has regulated persons practicing before it since 1861, *see* Act of Mar. 2, 1861, ch. 88, § 8, 12 Stat. 244, 247 (codified as amended at 35 U.S.C. § 32 (1976)); (2) The Treasury Department's authority originated in 1884, *see* Act of July 7, 1884, ch. 334, § 3, 23 Stat. 236, 258 (codified as amended at 31 U.S.C. § 1026 (1976)); and (3) The Supreme Court extensively reviewed and upheld the authority of the Patent and Trademark Office to regulate persons practicing before the office. *Sperry v. Florida*, 373 U.S. 379 (1963). Finally, the "contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication has a . . . difficult burden of persuasion to carry. . . . [A] court [must determine] from the special facts and circumstances . . . that the risk of unfairness is intolerably high." *Withrow v. Larkin*, 421 U.S. 35, 47, 58 (1975) (emphasis added); *see supra* text accompanying notes 36-37. Arguments based only on "potential for abuse" do not seem to satisfy the *Withrow* standard for violation of due process, in light of Patent and Treasury experiences and the absence of specific facts demonstrating abuse in the regulation of attorneys throughout the federal administrative process.

47. *See supra* notes 41-44 and accompanying text. An early draft of the Waxman/Forrest Proposal presented another aspect of the issue whether agencies should have authority to discipline persons practicing before them:

[I]n the case of at least two federal agencies, the Internal Revenue Service and the Patent Office, the Congress has specifically addressed itself to the requirements of practice, and has authorized those agencies to promulgate and enforce specialized standards of conduct and to discipline attorneys. . . .

The rationale for a separate set of discipline rules for these agencies is particularly strong because the Congressional grant of authority to the Secretary of the Treasury to suspend or disbar practitioners before the IRS covers CPA's and enrolled agents (anyone admitted to practice before the IRS who is not an attorney or CPA) as well as attorneys, providing consistency of treatment for all practitioners, and Patent Office practice also includes practitioners who are not attorneys.

ABA Sections of Admin. Law, Natural Resources Law, & Pub. Util. Law, & Fed. Communications Bar Ass'n, Report to the House of Delegates 10-11 & n.* (draft Mar. 5, 1982) (on

the power to regulate attorneys practicing before federal agencies must be express and not implied.⁴⁸

In *Goldsmith v. United States Board of Tax Appeals*,⁴⁹ the Supreme Court found that Congress did not grant express authority to the Board, a federal agency. Nevertheless, the Justices implied "authority to prescribe . . . rules of practice for the admission of attorneys."⁵⁰ *Goldsmith* seems to be dispositive of the argument—the authority may be implied at least for the admission of attorneys. In 1965, however, Congress enacted the Agency Practice Act,⁵¹ which eliminated the authority of agencies to set admission requirements.⁵²

The argument that the Agency Practice Act eliminated the agencies' implied authority is based on the notion that an agency must have the power of admission to have the power to discipline. By denying agencies the power to refuse to allow attorneys to practice before them, Congress has thus implicitly denied them the power to discipline attorneys.⁵³ The Court of Appeals for the Second Circuit expressly rejected this argument in *Touche Ross & Co. v. SEC*, on the basis of statutory interpretation and legislative history.⁵⁴ In addition, the argument analogizes to the judicial

file with the *Case Western Reserve Law Review* and the ACUS). Chairman Franck criticized this view:

Parenthetically, the rationale you advance for granting two specific agencies exemptions from the prohibition against the merger of disciplinary and substantive jurisdiction in the same agency threatens to swallow the general rule. There are after all many agencies in addition to those two before whom both lawyers and non-lawyers practice, including agencies who in our judgment have exercised the merged jurisdiction they claim they possess in a manner reflecting seriously inadequate sensitivity to the client interests at stake.

Franck Letter to Waxman & Forrest, *supra* note 39, at 1–2.

48. See, e.g., *Touche Ross & Co. v. SEC*, 609 F.2d 570, 578 n.13 (2d Cir. 1979); Letter from Thomas Lumbar to William Warfield Ross 4 (Jan. 11, 1979) (on file with the *Case Western Reserve Law Review* and the ACUS) [hereinafter cited as Lumbar Letter to Ross].

49. 270 U.S. 117 (1926) (denying writ of mandamus to compel Board of Tax Appeals to enroll CPA as attorney with right to practice before it).

50. *Id.* at 122; see *infra* notes 56–57 and accompanying text.

51. Act of Nov. 8, 1965, Pub. L. No. 89–332, 79 Stat. 1281 (codified as amended at 5 U.S.C. § 500 (1982)). For a detailed discussion of the Act, see *infra* notes 58–75 and accompanying text.

52. 5 U.S.C. § 500(b), (e). The Act exempts the Patent and Trademark Office. *Id.* § 500(e). It also contains an ambiguous provision: "This section does not . . . authorize or limit the discipline, including disbarment, of individuals who appear in a representative capacity before an agency. *Id.* § 500(d)(2).

53. Lumbar Letter to Ross, *supra* note 48, at 4.

54. 609 F.2d 570, 578 n.13 (2d Cir. 1979). The court stated:

Appellants contend that the enactment in 1965 of 5 U.S.C. § 500, eliminating federal agency practice admission requirements, demonstrates the intent of Con-

power to regulate attorneys; however, that may not be the power present in this situation. If Congress has authority to regulate attorneys practicing before federal agencies, the issue is delegation and not separation of powers. The appropriate inquiry would then become whether Congress may delegate all or a portion of the function and whether it used the appropriate standards in the delegation.⁵⁵

In *Sperry v. Florida ex rel. Florida Bar*,⁵⁶ the Court sustained the authority of the Patent and Trademark Office to regulate the persons practicing before it by stating: "Finally, § 31 [regulations for agents and attorneys] contains sufficient standards to guide the Patent Office in its admissions policy to avoid the criticism that Congress has improperly delegated *its* powers to the administrative agency."⁵⁷ The Court seemed to indicate that the authority to set admission requirements, the first aspect of regulating the practice of law, is a power which remains with Congress unless effectively delegated. When Congress withdrew the power to set admission requirements from federal agencies except the Patent

gress to strip the SEC of any authority to discipline professionals practicing before it. The stated purpose of the section was quite to the contrary. It was intended to ensure that persons appearing before the agencies *be represented by attorneys of their choice*. . . . Moreover, the statute explicitly provides in § 500(d)(2) that the section "*does not* . . . authorize or limit the discipline, including disbarment, of individuals who appear in a representative capacity before an agency" (emphasis added). . . . The language, as appellants acknowledge, is "neutral". It neither authorizes nor limits the power of the agencies to discipline professionals who appear or practice before them

Id. (citations omitted).

55. See *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737 (D.D.C. 1971).

56. 373 U.S. 379 (1963).

57. *Id.* at 403, 404 (emphasis added). Article I, § 8 of the Constitution buttresses the authority of Congress to regulate persons practicing before the Patent and Trademark Office: "The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries" U.S. CONST. art. I, § 8, cl. 8. In addition, the *Sperry* Court discussed extensively the relationship between Congress and the Patent and Trademark Office. Despite these two points, the Court's statement should not be discounted as precedent for Congress' general authority to regulate persons practicing before administrative agencies.

The Supreme Court pursued this point in *Goldsmith v. United States Bd. of Tax Appeals*, 270 U.S. 117 (1926), where it sustained the Board's implied power to prescribe rules for the admission of accountants to practice before it. In dictum, the Court acknowledged the authority of Congress to delegate the power to regulate attorneys to an agency. *Id.* at 122. The Court did not, however, refer to the express constitutional delegation of power to Congress "to lay and collect Taxes." U.S. CONST. art. I, § 8, cl. 1.

Sperry and *Goldsmith* both involved agencies which have powers under express constitutional delegations to Congress. Despite this fact, one can argue that this distinction has no significance because all congressional delegations to agencies must be constitutionally authorized, expressly or impliedly, or they are impermissible.

and Trademark Office, the authority to promulgate standards and to discipline remained in the agencies to the extent previously delegated. As a consequence, the Agency Practice Act arguably did not affect the ability of federal agencies to base their authority to regulate attorneys, except for admission requirements, on an implied delegation from Congress.

II. ADMISSION REQUIREMENTS FOR ATTORNEYS PRACTICING BEFORE FEDERAL AGENCIES

A. *Requirements of the Agency Practice Act*

The Agency Practice Act⁵⁸ allows an individual to choose any attorney in good standing to represent him in federal agency matters,⁵⁹ that is, the attorney must be a member in good standing of a state bar. The attorney must also file a written declaration that he is qualified and authorized to represent the individual.⁶⁰ The Act has four limitations. It does not (1) authorize or limit the discipline of persons acting in a representative capacity before an agency, (2) authorize representation by a former employee prohibited by statute or regulation, (3) prevent an agency from requiring a power of attorney as a condition to a monetary settlement, or (4) apply to practice before the Patent and Trademark Office.⁶¹

The Act contains the limitations on former employees to permit agencies to deal with the so-called "revolving door" practice of federal government employees.⁶² Some agencies have promul-

58. 5 U.S.C. § 500 (1982).

59. H.R. REP. NO. 1141, 89th Cong., 1st Sess. 2, *reprinted in* 1965 U.S. CODE CONG. & AD. NEWS 4171. Prior to the Act a number of agencies had admission requirements restricting the right to practice before them. *See* F. VOM BAUR, STANDARDS OF ADMISSION FOR PRACTICE BEFORE FEDERAL ADMINISTRATIVE AGENCIES (1953); Henley, *Admission of Attorneys to Practice Before Federal Administrative Agencies*, 24 I.C.C. PRAC. J. 1198-206 (1957). In 1957, the Justice Department recommended that agencies abolish admission requirements and most agencies did by 1965. When Congress considered enacting the Agency Practice Act, only the Department of the Treasury and the Patent Office raised objections to eliminating their admission to practice requirements. *See* H.R. REP. NO. 1141, 89th Cong., 1st Sess. 2, *reprinted in* 1965 U.S. CODE CONG. & AD. NEWS 4171.

60. 5 U.S.C. § 500(b) (1982).

61. *Id.* § 500(d)(1)-(4), (e).

62. [M]any government attorneys . . . choose not to make government service a career and enter or return to private practice. This flow of attorneys benefits the government by bringing seasoned lawyers and enthusiastic law school graduates into public service, and gives attorneys an opportunity to acquire expertise and skills that can benefit their subsequent private practice.

Note, *Conflicts of Interest and the Former Government Attorney*, 65 GEO. L.J. 1025, 1026 (1977).

gated their own rules restricting postemployment activities.⁶³ In addition, Congress has entered the field with specific guidelines. The Ethics in Government Act of 1978 amended existing postemployment legislation and imposed additional proscriptions.⁶⁴ Statutes and regulations restricting postemployment activities attempt to eliminate possible unfair influence with the former agency, deter improper use of confidential information, and discourage an employee from tailoring his official conduct in office to enhance future employability in the private sector.⁶⁵

The limitation requiring a power of attorney as a condition to monetary settlement has not been controversial. This restriction, however, may not be broad enough to address a situation encountered by many agencies—release of information restricted by statute.⁶⁶ A recent district court case, *McDaniel v. Israel*,⁶⁷ is relevant to the release of information problem. The court struck down a Social Security Administration (SSA) regulation as inconsistent with the Agency Practice Act.⁶⁸ The SSA rule required submission of a notice, signed by the client, stating that the attorney represented the client in dealings with the SSA.⁶⁹ The court held improper the SSA's refusal to send the attorney notices and written communications until he submitted the signed appointment of representation.⁷⁰ Although the court recognized the protection of confidential, personal information as a concern, it held that "the public is already adequately protected . . . by 18 U.S.C. § 1007. . . . Congress has established the procedure by which an attorney may qualify to represent a claimant [and] this is all that is necessary and appropriate."⁷¹

Federal agencies may be caught in a statutory conflict when dealing with information releases. Particular statutes require that

63. See, e.g., 5 C.F.R. § 735 (1983) (Office of Personnel Management); 16 C.F.R. § 1025.67 (1983) (Consumer Product Safety Commission); 20 C.F.R. § 501.11(b) (1983) (Department of Labor); 42 C.F.R. 5357 (1983) (Postal Service); 46 C.F.R. § 502.32 (1983) (Federal Maritime Commission).

64. 18 U.S.C. § 207 (1982).

65. See Shapiro, *The Post-Employment Restrictions of the Ohio Ethics Law: Prior Practice and Recent Amendments*, 7 OHIO N.U.L. REV. 913, 917-23 (1980); *infra* note 163. The ACUS recently adopted a recommendation relating to postemployment restrictions. Recommendation No. 79-7, 1 C.F.R. § 305.79-7 (1983).

66. See *infra* notes 72-73 and accompanying text.

67. 534 F. Supp. 367 (W.D. Va. 1982).

68. *Id.* at 370.

69. 20 C.F.R. § 404.1707 (1983).

70. 534 F. Supp. at 370.

71. *Id.*

authorization be obtained before the agency releases restricted information.⁷² Sanctions may be imposed, in fact, on all officers and employees of the United States for improper release.⁷³ On the other hand, *McDaniel* can be read as permitting an agency to provide restricted information about the client to the attorney without a further release from the client. The *McDaniel* opinion does not, however, prohibit an agency from requiring a power of attorney from a client prior to releasing restricted information. The court only held that an agency may not make this power of attorney a requirement of admission to practice before an agency. An agency can presumably require a qualified⁷⁴ attorney to submit a power of attorney signed by the client prior to releasing information restricted by statute. This procedure would involve two steps, rather than the one-step process invalidated in *McDaniel*. Even if the court correctly interpreted the statute, this two-step process is an unnecessary bureaucratic burden. Congress should therefore amend the Agency Practice Act to permit an agency to require a power of attorney from the client authorizing release of information restricted by statute as a condition precedent to recognizing an attorney's representation.⁷⁵

B. *Requirements Beyond the Agency Practice Act*

In the Federal Questionnaire,⁷⁶ over ninety-five percent of the responding agencies did not favor admission requirements beyond those required by the Agency Practice Act.⁷⁷ The Postal Service

72. See, e.g., 26 U.S.C. § 6103(a) (1982) (IRS); 35 U.S.C. §§ 122, 181 (1976) (Patent and Trademark Office); 38 U.S.C. § 3305 (Supp. V 1981) (Veterans Administration).

73. See, e.g., 18 U.S.C. § 1905 (1982); 26 U.S.C. §§ 7213(a)(1), 7217 (1982); 35 U.S.C. § 186 (1976) (patent information); 38 U.S.C. § 3301(j) (Supp. V 1981) (incorporating penalty provisions of Privacy Act of 1974, 5 U.S.C. § 552a (1982)).

74. 5 U.S.C. § 500(b) (1982).

75. Section 500(d) should be amended to read: "This section does not . . . prevent an agency from requiring a power of attorney as a condition to the release of information the disclosure of which is restricted by law." See Weckstein, *Control of Practice and Discipline of Representatives before Federal Administrative Agencies—A Study and Recommendations for the Administrative Conference of the United States* 34-42 (draft Oct. 1970) (on file with the *Case Western Reserve Law Review* and the ACUS) (presenting similar recommendation and discussing powers of appointment as required by agencies in 1970); see also H.R. REP. NO. 1141, 89th Cong., 1st Sess. 2, reprinted in 1965 U.S. CODE CONG. & AD. NEWS 4171 (legislative history of § 500(d)(4)).

76. See *supra* note 13; *infra* appendix A.

77. *Id.* Twenty-seven agencies responded to the Federal Questionnaire. In some instances the author received responses from both the general counsel and chief administrative law judge of the agency, whereas in other instances only one official responded. The following agencies responded: Department of State, Postal Rate Commission, Department of Interior, United States International Trade Commission, Department of Commerce, Na-

did indicate, however, that it currently imposes an additional admission requirement. Its rules provide that any attorney in good standing who is not restricted under any court or executive order may represent others before the Postal Service and that any person disbarred from practice before the Postal Service or any other executive department is ineligible for admission to practice.⁷⁸

These rules raise two issues. First, has the Postal Service imposed an additional admission requirement by denying eligibility to practice to an attorney who is under a disciplinary order? The Agency Practice Act does not appear to permit denial of eligibility to practice due to discipline imposed by another agency. The Postal Service proscription thus seems to violate the Act.⁷⁹ Postal Service regulation 951 also appears to conflict with the Agency

tional Labor Relations Board, Commodity Futures Trading Commission, Department of Housing and Urban Development, Federal Reserve System, Department of Transportation, Federal Maritime Commission, Interstate Commerce Commission, Merit Systems Protection Board, Department of Agriculture, Federal Communications Commission, Department of the Treasury, Department of Health and Human Services, United States Coast Guard, Securities and Exchange Commission, Federal Energy Regulatory Commission, Civil Aeronautics Board, Federal Trade Commission, Drug Enforcement Administration, Food and Drug Administration, United States Postal Service, National Transportation Safety Board, and Occupational Safety and Health Review Commission. Of these, only 24 responded to the question on admission requirements. Two stated parenthetically that the imposition of additional requirements would relate to competence. See *infra* appendix A, questions 1 & 2; *supra* note 13.

78. 39 C.F.R. § 951.2(c), .3(a)-(b) (1983).

79. In addition, at least two parts of SEC rule 2(e), 17 C.F.R. § 201.2(e) (1983), arguably violate the Agency Practice Act as “indirect” admission requirements. The rule permits the SEC to discipline an attorney who does not “possess the requisite qualifications to represent others” or is “lacking in character or integrity.” *Id.* § 201.2(e)(1)(i)-(ii); see *infra* note 101 for the text of rule 2(e).

The issue is whether these standards permit the SEC to define competence and moral qualifications and to restrict eligibility to practice before it. If the response is affirmative, defining these concepts independently rather than relying on the professional standards of the licensing state seems to violate the Agency Practice Act. The Act provides that federal agencies base admission to practice on the individual’s admission to a state bar. 5 U.S.C. § 500(b)(1982). The legislative history of the Agency Practice Act reveals that Congress intended to eliminate specialized bars before federal agencies and to have states determine competence and moral character, except for the Patent and Trademark Office. See H.R. REP. NO. 1141, 89th Cong., 1st Sess., *reprinted in* 1965 U.S. CODE CONG. & AD. NEWS 4170-80; S. REP. NO. 755, 89th Cong., 1st Sess. 1-7 (1965). If an agency can discipline a person because he lacks character or integrity, is not the agency indirectly saying that he must meet its competence and moral standards or the agency will remove his eligibility to practice by a disciplinary proceeding? Rule 2(e)(1)(ii)’s alternative basis for discipline—that the attorney has “engaged in unethical or improper professional conduct”—reinforces the reasonableness of this interpretation of rule 2(e). 17 C.F.R. § 201.2(e)(1)(ii) (1983). For a discussion of whether the Agency Practice Act authorizes federal agencies to adopt standards relating to unethical or improper conduct, see *infra* notes 100-74 and accompanying text.

Practice Act's provision that an attorney must only be "a member in good standing of the bar of the highest court of a State" ⁸⁰ The Act seems to say that if a person is a member of two state bars and one state has disbarred him, that person remains qualified to practice before a federal agency. ⁸¹ In contrast, the regulation permits the Postal Service to disqualify a person from practicing before it when one state has disciplined him but he remains a member in good standing of another state bar. ⁸² Congress apparently overlooked this anomaly when it enacted the Agency Practice Act. Congress should therefore amend the Act to eliminate this possibility. ⁸³

Second, may an agency ipso facto deny eligibility to practice on the basis of the licensing state's or an executive agency's disciplinary order without an independent determination of the alleged disqualifying conduct by the agency? Postal Service regulation 951 also raises this issue. With regard to discipline imposed by another agency, the answer seems clear. Under the Agency Practice Act, one agency may not deny eligibility to practice because of disciplinary action taken by or misconduct before another agency. ⁸⁴ The Act provides for a single admission re-

80. 5 U.S.C. § 500(b) (1982). For a discussion of the effect given by a federal agency to a disciplinary action of a licensing state, see Letters between Michael Franck and Howard C. Anderson (May 17, 19, 28 & June 2, 4, 7, 1982) (on file with the *Case Western Reserve Law Review* and the ACUS) [hereinafter cited as Anderson Letters].

81. See Anderson Letter (May 19, 1982), *supra* note 80, at 2; Anderson Letter (May 28, 1982), *supra* note 80, at 2.

82. 39 C.F.R. § 951.2(c) (1983).

83. 5 U.S.C. § 500(b) should be amended to read:

An individual who is a member in good standing of the bar of the highest court of a State may represent a person before an agency on filing with the agency a written declaration that he is currently qualified as provided by this subsection and is authorized to represent the particular person in whose behalf he acts. Notwithstanding, an agency which receives notice that a State license, by virtue of which an individual is (or could have been) qualified under this subsection to represent persons before the agency, has been suspended, enjoined, restrained, revoked, or otherwise restricted by the State, may require the individual to show cause within forty days why he should not be similarly suspended, enjoined, restrained, disbarred, or otherwise restricted in representing persons before the agency. The agency may suspend temporarily the right of the individual to represent persons before the agency unless and until he shall show cause.

The author employs the indefinite article "a," rather than the definite article "the," to modify "state license" so that if a person is licensed in more than one state, an agency may require him to "show cause" even though his right to practice has not been affected in all licensing states. For a similar recommendation, see T. Lumbard, Proposed Amendments to Title 5, United States Code, Section 500, at 4-5, *attached to* Letter from Thomas Lumbard to Jeffrey S. Lubbers (Mar. 25, 1982) (on file with the *Case Western Reserve Law Review* and the ACUS); see also *infra* note 94 (suggesting another amendment to § 500(b)).

84. Although the Agency Practice Act does not "authorize or limit the discipline, in-

quirement—current good standing to practice before the highest court of a state.⁸⁵

With regard to discipline by a licensing authority, three federal court cases are instructive.⁸⁶ In *Selling v. Radford*, the Supreme Court held that effect may be given to an attorney's disbarment by the highest court of a state when considering that attorney's right to practice before the United States Supreme Court.⁸⁷ The Court explained, however, that it would not give effect to a state court's disbarment proceeding which violated due process requirements, contained an infirmity as to proof of facts, or demonstrated a grave reason why it should be disregarded.⁸⁸ In *Theard v. United States*,⁸⁹ the Court amplified its holding in *Selling*, stating:

Disbarment being the very serious business that it is, ample opportunity must be afforded to show cause why an accused practitioner should not be disbarred. If the accusation rests on disbarment by a state court, such determination of course brings title deeds of high respect. But it is not conclusively binding on the federal courts.⁹⁰

In 1971, the Court of Appeals for the Ninth Circuit extended the rationale of *Theard* and *Selling* to administrative agencies considering the effect to be given disciplinary action taken by an attorney's licensing state.⁹¹ Five years later, the Attorney General of the United States restated the Court of Appeals' requirement of "an independent judgment in suspension proceedings" by reversing the rehearing of the case.⁹² The Attorney General recommended that Congress amend the Agency Practice Act "to provide for a 'show-cause' hearing before an agency restricts the right to practice because of discipline imposed by the licensing state."⁹³ This recommendation should be implemented as soon as possible.⁹⁴

cluding disbarment, of individuals who appear in a representative capacity before an agency," nothing indicates that Congress intended this provision to apply to misconduct before another agency. 5 U.S.C. § 500(d)(2) (1982).

85. *Id.* § 500(b).

86. For a discussion of two of these cases, see Anderson Letter (May 28, 1982), *supra* note 80, at 2; Anderson Letter (June 2, 1982), *supra* note 80, at 2; Anderson Letter (June 4, 1982), *supra* note 80, at 2-3.

87. 243 U.S. 46, 50-51 (1917).

88. *Id.* at 51.

89. 354 U.S. 278 (1957).

90. *Id.* at 282.

91. *Bogart v. Carter*, 445 F.2d 321 (9th Cir. 1971).

92. *In re Bogart*, 38 Ad. L. Rep. 2d (P & F) 124 (1976).

93. *Id.* at 129.

94. If Congress amends the Agency Practice Act to permit reciprocity for discipline

C. A Centralized Admissions Register

An early draft of the Franck Proposal suggested the creation of a centralized register of attorneys because

[a]n efficient system requires the development and maintenance [sic] of a roster of the name, address, and birthdate of all practitioners, the agencies before which they are admitted to practice, and the jurisdictions in which they are licensed, in order to assist . . . in the proper identification of practitioners who allegedly have engaged in professional misconduct.⁹⁵

Opposition to the register apparently induced the ABA Standing Committee to delete the concept from subsequent drafts and the final proposed rules presented to the House of Delegates.⁹⁶ Critics viewed the register as "burdensome,"⁹⁷ "creating great repositories of files,"⁹⁸ and inherently incomplete because of the impossibility of constructing a comprehensive listing.⁹⁹ The expense and problems involved in producing a complete listing make the creation of a centralized listing of attorneys practicing in the federal administrative process highly unlikely.

imposed by states, federal courts, and other federal agencies, the suggested amendment to 5 U.S.C. § 500(b), *supra* note 83, should be changed to read:

Notwithstanding, an agency which receives notice that a State license, by virtue of which an individual is (or could have been) qualified under this subsection to represent persons before the agency, or that such an individual's qualification to represent persons before a federal court or before another agency has been suspended, enjoined, restrained, revoked, or otherwise restricted by the State, federal court, or other agency may require the individual to show cause within forty days why he should not be similarly suspended, enjoined, restrained, disbarred, or otherwise restricted in representing persons before the agency. The agency may suspend temporarily the right of the individual to represent persons before the agency unless and until he shall show cause.

For further discussion of reciprocity of agency discipline, see *infra* notes 212-14 and accompanying text.

95. ABA Standing Comm. on Professional Discipline, Draft Model Mechanism 9 (Mar. 19, 1981) (on file with the *Case Western Reserve Law Review* and the ACUS).

96. Franck Proposal, *supra* note 6.

97. Letter from Michael R. Klein to William T. Warner 3 (Apr. 15, 1981) (on file with the *Case Western Reserve Law Review* and the ACUS) [hereinafter referred to as Klein Letter].

98. Letter from Herbert E. Forrest to William T. Warner 8 (Apr. 8, 1981) (on file with the *Case Western Reserve Law Review* and the ACUS).

99. The listing would be incomplete because some "agencies do not enroll a practitioner but instead provide that an attorney qualified to practice in any state . . . is automatically authorized to practice before that agency," Letter from Fred Grabowsky to Marcia L. Proctor 2 (Apr. 9, 1981) (on file with the *Case Western Reserve Law Review* and the ACUS), and a "lawyer in the hinterlands who never physically appears in agency premises, in person or by paper, but who advises a client about a statute or rule administered by an agency" will not be included. Klein Letter, *supra* note 97, at 3.

III. STANDARDS FOR AGENCY REGULATION OF ATTORNEY CONDUCT

A. *Agencies' Attempts at Establishing Standards*

On February 28, 1981, the SEC announced in *In re Carter*,¹⁰⁰ an interpretation of SEC practice rule 2(e).¹⁰¹ In essence, the SEC held that an attorney violates professional standards if he fails to take prompt steps to end his corporate client's noncompliance with the disclosure requirements of the federal securities laws.¹⁰² The SEC explained that an attorney should first counsel accurate disclosure. If the client, however, does not follow this advice and continues to violate the securities laws, the attorney must take "further, more affirmative steps."¹⁰³ For example, the attorney should resign, approach the board of directors directly, or seek aid from other members of management "to correct the underlying problem, rather than . . . capitulat[e] to the desires of a strong-willed, but misguided client."¹⁰⁴

Six months later, the Commissioners requested comments on the appropriateness of the announced interpretation.¹⁰⁵ The request specifically stated, however, that comments on the SEC's

100. [1981 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,847 (Feb. 28, 1981).

101. 17 C.F.R. § 201.2(e)(1) (1983). The rule provides:

The Commission may deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found by the Commission after notice of and opportunity for hearing in the matter (i) not to possess the requisite qualifications to represent others, or (ii) to be lacking in character or integrity or to have engaged in unethical or improper professional conduct, or (iii) to have willfully violated, or willfully aided and abetted the violation of any provision of the federal securities laws . . . or the rules and regulations thereunder.

See *supra* note 79.

102. [1981 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,847, at 84,172. The promulgation of new policy without applying that policy in the instant adjudication would appear to be a "prospective order" similar in nature to the "Excelsior Rule" invalidated in *NLRB v. Wyman-Gordan Co.*, 394 U.S. 759 (1969). Cf. *McDonald v. Watt*, 653 F.2d 1035, 1042 n.17 (5th Cir. 1981).

103. [1981 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,847, at 84,172.

104. *Id.*

105. Request for Comments on Standard of Conduct Constituting Unethical or Improper Professional Practice Before the Commission, [1981-82 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 83,026 (Sept. 21, 1981). The SEC's request for comments did not cure the prospective order aspect of the interpretation, see *supra* note 102, since the interpretation remained in effect subject to change:

After careful consideration of these comments, the Commission will issue a further release summarizing and analyzing the comments received. *Based upon the comments, it may or may not determine to expand or modify its interpretation.* Until that time, *the present interpretation will govern all similar circumstances* for purposes of proceedings pursuant to Rule 2(e) if the conduct occurred after February 28, 1981.

Id. at 84,532 (emphasis added).

"authority to adopt and administer rule 2(e)" were not being solicited.¹⁰⁶ The attempt to limit public input to the *Carter* interpretation of rule 2(e) was unsuccessful. Many comments directly challenged the Commission's authority to establish *any* standards similar to canons of ethics or a code of professional responsibility.¹⁰⁷ The Commissioners' request for comments on the *Carter* standard prompted concern among associations of attorneys and individual practitioners about an emerging type of practice standard. This standard effectively would compel attorneys to assist in carrying out an agency's substantive law responsibilities. In 1973, the SEC had clearly stated its intention to enlist attorneys, and it reaffirmed that purpose in *Carter*:

We have previously noted "the peculiarly [sic] strategic and especially central place of the private practicing lawyer in the investment process and in the enforcement of the body of federal law aimed at keeping that process fair [T]he task of enforcing the securities laws rests in overwhelming measure on the bar's shoulders."¹⁰⁸

In addition to the SEC, the IRS proposed a similar role for

106. *Id.*

107. See *Comments to SEC Zero in on Agency Authority*, 68 A.B.A. J. 252 (1982), for a brief summary of a number of comments. All comments received are available for public inspection at the SEC under file no. 57-905.

The ABA Section of Corporation, Banking and Business Law's response is representative of the comments received:

The Proposal appears to reflect the Commission's belief that, notwithstanding the absence of any authority for the Commission to establish a "federal securities bar," the Commission somehow possesses and should exercise authority, analogous to that possessed by state bar authorities and state courts, to promulgate the equivalent of canons of ethics or a code of professional responsibility. The current proposal is, of course, concerned with but one aspect of the relationship between lawyers and their corporate securities clients. We find nothing in the Release, however, that acknowledges any limitation on the Commission's belief concerning its power to set standards of conduct for lawyers acting as lawyers. . . . In our view the Proposal to transform the Commission into a promulgator of ethical norms for the legal profession is a novel and disturbing one.

ABA Section of Corp., Banking & Business Law, Response to Securities Act Release No. 6344, Exchange Act Release No. 18106, Public Utility Holding Company Act Release No. 22200, Trust Indenture Release No. 656, Investment Company Act Release No. 11942, Investment Advisors Act Release No. 775, at 2-3 (Sept. 21, 1981) (on file with the *Case Western Reserve Law Review* and the ACUS) (subsequently adopted by ABA Board of Governors as ABA policy).

108. [1981 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,847, at 84,150 n.21 (quoting *In re Fields*, 45 S.E.C. 262, 266 n.20 (1973), *aff'd without opinion*, 495 F.2d 1085 (D.C. Cir. 1974)). The SEC in *Fields* made its intent even clearer:

[T]his Commission with its small staff, limited resources, and onerous tasks is peculiarly dependent on the probity and the diligence of the professionals who practice before it. This is a field where unscrupulous lawyers can inflict irreparable harm. . . . Hence we are under a duty to hold our bar to appropriately rigorous standards of professional honor.

attorneys. In 1980 it proposed new rules which would have prohibited an attorney from issuing a tax shelter opinion unless he concluded that it was "more likely than not that the bulk of the tax benefits on the basis of which the tax shelter had been promoted are allowable under the tax law."¹⁰⁹ A breach of this standard would have constituted grounds for disbarment before the IRS without regard to the willfulness of the violation.¹¹⁰ Other federal agencies followed the SEC and IRS initiatives to promulgate standards of conduct for attorneys practicing before them.¹¹¹

This increased federal agency interest led in large part to the ABA House of Delegates' attorney conduct proposals in August 1982.¹¹²

B. Agencies' Authority to Establish Standards

Analysis of the authority of federal agencies to promulgate standards of conduct is central to understanding regulation of at-

Id. at 266 n.20. *But cf. In re Keating, Muething & Klekamp*, [1979 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,124 at 81,992 (July 11, 1979) (Karmel, Comm'r, dissenting):

In my opinion, Rule 2(e) is an invalid exercise of the Commission's authority. I recognize that I am not writing on a clean slate, but until the question of the Commission's authority to discipline attorneys is validated by the United States Supreme Court or the Congress, I believe the validity of Rule 2(e) will not be free from doubt. I also recognize that the Commission has brought numerous 2(e) proceedings against attorneys, and that unless the courts or Congress abrogate the rule, the Commission, unfortunately, is unlikely to rescind it. Accordingly, I advocate that the Commission at least confine proceedings against attorneys under Rule 2(e) to cases in which an attorney has improperly conducted himself while personally representing clients before the Commission. Further, the misconduct should thwart the Commission's ability to function or should obstruct administrative justice. In no case, I believe, should the Commission invoke an equivocal administrative remedy like Rule 2(e) to discipline attorneys for conduct which does not directly threaten its administrative processes. To do so, is tantamount to setting professional standards for the practice of law.

Id. at 81,745. For a discussion of the SEC position on enlisting attorneys, see Pickholtz, *The Proposed Model Rules of Professional Conduct—and Other Assaults Upon the Attorney-Client Relationship*, 36 BUS. LAW. 1841, 1848-51 (1981).

109. Amendments to Circular 230, 45 Fed. Reg. 58,594 (1980).

110. *Id.* at 58,597-98. For an explanation of the proposed tax shelter rule, see Hester, *Are New Treasury Rules a Tax Device in Disguise?*, Legal Times (Wash.), Sept. 29, 1980, at 12, col. 1. See also ABA Comm. on Ethics and Professional Responsibility, Formal Op. 346 (1982), reprinted in *Professional Ethics Opinions*, 68 A.B.A. J. 471, 471 n.2 (1982) (providing citations to other authorities discussing this issue).

One commentator observed: "Just as the debate over the SEC's Rule 2(e) program begins to boil and bubble [the IRS] is suggesting improper conduct in tax counseling could be grounds for discipline by the Treasury Department." Lempert, *IRS Mulls Attorney Shelter Crackdown*, Legal Times (Wash.), Dec. 3, 1979, at 1, col. 2.

111. See, e.g., *NRC Will Discipline Lawyers Under Proposed Conduct Rules*, Nat'l L.J., Feb. 11, 1980, at 8, col. 1; Moore, *FERC Criticizes Lawyers' Work*, Legal Times (Wash.), Jan. 4, 1982, at 2, col. 3.

112. See *supra* notes 6-11 and accompanying text.

torneys by federal agencies. Even if one concludes that an agency has authority to promulgate such standards, one must then consider the extent to which the power may be exercised.¹¹³ Without question, Congress has granted explicit authority to adopt practice standards and to discipline attorneys who violate the standards to the Patent and Trademark Office: "The Commissioner . . . may prescribe regulations governing the . . . conduct of attorneys [and] may, after notice and opportunity for a hearing, suspend or exclude, either generally or in any particular case, from further practice before the Patent and Trademark Office any . . . attorney . . . who does not comply with the regulations."¹¹⁴ The Treasury Department has similar authority:

The Secretary of Treasury may prescribe rules and regulations governing the recognition of . . . attorneys [and] may after due notice and opportunity for hearing suspend, and disbar from further practice before his department any such . . . attorney shown to be incompetent, disreputable, or who refuses to comply with the said rules and regulations.¹¹⁵

Except for the few agencies with express authority to promulgate rules and discipline attorneys for violations,¹¹⁶ this authority must be implied. In *Touche Ross & Co. v. SEC*,¹¹⁷ the Court of Appeals for the Second Circuit approved the SEC's implied authority under rule 2(e) to discipline professionals—accountants in the instant case—practicing before it. The court held that although the SEC has "no express statutory provision authorizing the Commission to discipline professionals appearing before it," rule 2(e) is a valid exercise of the agency's rulemaking authority,¹¹⁸ since it "protects[s] the integrity of its own processes [and]

113. A proposed addition to the Waxman/Forrest Proposal, *supra* note 7, attempted "to preclude any implication that the ABA . . . endorses the efficacy of express statutory authorizations of federal agencies to adopt standards of practice [and to make clear that] the exceptions for such express statutory authority [in the original proposal were] not intended to express any conclusion . . . on those important issues." Letter from W. Loeber Landau to Antonin Scalia 1-2 (July 16, 1982) (on file with the *Case Western Reserve Law Review* and the ACUS). This resolution may have been prompted by a concern that the original Waxman/Forrest Proposal would permit the SEC simply to seek express authority from Congress to adopt standards. See Letter from Stuart N. Senniger to Joseph A. DeGrandi 3-4 (July 19, 1982) (on file with the *Case Western Reserve Law Review* and the ACUS).

114. 35 U.S.C. §§ 31, 32 (1976).

115. 31 U.S.C. § 1026 (1976).

116. For another example of express authority, see 43 U.S.C. § 1464 (1976) (empowering Secretary of the Interior to promulgate rules to regulate attorneys, with language similar to that empowering Secretary of the Treasury). See *supra* text accompanying note 115.

117. 609 F.2d 570 (2d Cir. 1979).

118. Section 23(a)(1) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78w(a)(1)

ensure[s] that those professionals on whom the Commission relies . . . perform their tasks diligently and with a reasonable degree of competence.”¹¹⁹ Although *Touche Ross* only sustained rule 2(e) as applied to accountants, strong dictum suggests that the court’s rationale applies equally to the SEC’s authority to discipline attorneys under rule 2(e).¹²⁰

The court’s basis for sustaining the implied authority of agencies to regulate the conduct of persons practicing before them is open to criticism. The breadth of the power to “protect the integrity of . . . administrative procedures and the public” is left unclear. Dissenting in *Keating, Muething & Klekamp*,¹²¹ SEC Commissioner Karmel criticized *Touche Ross*:

[The Court’s] rationale may justify the use of Rule 2(e) to discipline accountants, although express statutory authority to this effect would, in my mind, be better government. However I do not believe this rationale is sufficient to justify the use of Rule 2(e), as presently drafted, as a general enforcement tool to discipline attorneys . . . In my opinion, it is *improper* for an independent federal administrative agency *to impose sanctions which are not specified by Congress*. In addition, the potential corruption of justice when an administrative agency with significant prosecutorial responsibilities has the power to sanction an adversary representing and advising a client persuades me that the Commission should not exercise disciplinary power against attorneys. The Commission, like any other government body, may have some need to have and to utilize a *disciplinary power against attorneys who practice before it in order to keep its proceedings orderly and dignified*. However, the lack of any demonstrated need for an enforcement mechanism generally to raise the competence of attorneys or to protect investors is indicated by the history of Rule 2(e)¹²²

(1982), authorizes the SEC “to make such rules and regulations as may be necessary or appropriate to implement the provisions of this title for which [it is] responsible”

119. 609 F.2d at 582; see *In re Carter*, [1981 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,847 at 84,147.

120. 609 F.2d 577-78. *But see infra* note 122.

121. [1979 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,124 at 81,992. *See supra* note 108.

122. *Id.* at 81,993. Commissioner Karmel noted the express statutory differences between the SEC’s authority to discipline attorneys and its authority over accountants:

Congress gave the [SEC] express statutory power in Section 19(a) and Schedule A of the Securities Act of 1933 . . . to define accounting terms and to require that financial statements be certified by an independent public accountant. It therefore can be argued that the administrative disciplining of accountants is a necessary and appropriate adjunct to an express Commission mandate and responsibility. In the case of attorneys, however, there is no such direct substantive authority for the Commission to implement by way of an administrative remedy.

Although other judicial decisions have sustained implied authority of agencies to regulate attorneys,¹²³ *Touche Ross* is the most recent precedent. Commissioner Karmel has correctly pointed out that *Touche Ross* is dictum with respect to attorneys and the SEC's statutory authority to regulate accountants differs from its authority to regulate attorneys.¹²⁴ Although the *Touche Ross* language seems clear, dictum is not precedent. Commissioner Karmel also questioned the extent to which an agency with authority to promulgate standards may address attorney conduct beyond that required to keep its proceedings orderly and dignified. She appeared to suggest making a distinction between standards which maintain order in or assure the integrity of a particular proceeding and those which enhance attorney competence or enlist attorneys to assist in enforcing substantive law. This distinction is arguably valid.

Something appears to be amiss when substantive law provisions such as disclosure in the securities area or tax shelter enforcement must be enforced by ethical standards. An attorney who violates a requirement imposed by statute should be called to task in the courts for the substantive violation.¹²⁵ A theoretical

Id. (referring to 15 U.S.C. §§ 77s(a), 77aa (1982)). Commissioner Karmel apparently opposed even express statutory authority, as indicated by her strong disapproval of congressional legislation then pending:

[T]here is presently pending in Congress legislation [S. 262] which contains a provision which could be construed to vest not only the Commission but any federal agency with effectively unlimited power to discipline attorneys. [S. 262 provides that] "each agency may prohibit any individual from appearing before the agency or its responsible employees whenever such individual refuses to adhere to reasonable standards of orderly and ethical conduct or continues, despite agency requests to the contrary, to engage in the deliberate use of dilatory tactics" Although enactment of this provision would solve the problems I have with the Commission's statutory authority to promulgate Rule 2(e), I believe such a provision would be contrary to sound public policy

Id. at 81,993 n.8 (quoting § 203(a) of S. 262, 96th Cong., 1st Sess., 125 CONG. REC. 1408, 1415 (1979) (emphasis added)). See Karmel, *Attorneys' Securities Law Liabilities*, 27 BUS. LAW. 1153 (1972); Daley & Karmel, *Attorneys' Responsibilities: Adversaries at the Bar of the SEC*, 24 EMORY L.J. 747 (1975).

123. See cases cited *supra* note 41.

124. See *supra* note 122.

125. The SEC, in addition to responding to attorney misconduct by rule 2(e) proceedings, also seeks injunctions against attorney violations of the securities laws. See, e.g., *SEC v. Blatt*, 583 F.2d 1325 (5th Cir. 1978); *SEC v. Coven*, 581 F.2d 1020 (2d Cir. 1978), *cert. denied*, 440 U.S. 950 (1979); *SEC v. Universal Major Indus.*, 546 F.2d 1044 (2d Cir. 1976), *cert. denied*, 434 U.S. 834 (1977); *SEC v. National Student Mktg. Corp.*, 538 F.2d 404 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1073 (1977). The SEC can also criminally prosecute attorneys for securities laws violations. See, e.g., *United States v. Benjamin*, 328 F.2d 854 (2d Cir. 1964). Sometimes these alternatives come together in one case. See, e.g., *In re Fields*, 45 S.E.C. 262 (1973) (permanently disqualifying under rule 2(e) an attorney who had been

basis for objecting to the use of professional standards to compensate for deficiencies in substantive law, or for the inconvenience, expense, or delay of pursuing substantive violations in the judicial or administrative process, is difficult to formulate. Dean John F. Sutton, Jr., however, provided an insight for analysis in his discussion of the Model Code of Professional Responsibility.¹²⁶ Dean Sutton first explained the Code's division into canons, which he defined as "general concepts used as chapter headings," ethical considerations, defined as "aspirational in character," and disciplinary rules, defined as "mandatory regulatory rules."¹²⁷ He then noted that canons and ethical considerations were not intended to be binding or enforced as regulatory rules or law, although this occasionally has occurred.¹²⁸ In addition, Dean Sutton observed that disciplinary rules have been misused in substantive cases as rules of procedure to affect lawyer conduct—an ill-suited role for the rules in some instances.¹²⁹

One can infer from Dean Sutton's remarks that guidelines to

enjoined four times from violating various sections of securities laws). On occasion, action taken by the SEC in a rule 2(e) proceeding is reversed. See, e.g., *Kivitz v. SEC*, 475 F.2d 956 (D.C. Cir. 1973). Lastly, an attorney may be subject to a damage action by persons injured by his misconduct. See, e.g., *Wachovia Bank and Trust Co., N.A. v. National Student Mktg. Corp.*, 650 F.2d 342 (D.C. Cir. 1980), *cert. denied*, 452 U.S. 954 (1981); cf. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976) (private cause of action against accountants). For application of a conflict of laws analysis to professional responsibility standards, see Fifiis, *Choice of Federal or State Law for Attorneys' Professional Responsibility in Securities Matters*, 56 N.Y.U. L. REV. 1236 (1981).

126. Sutton, *How Vulnerable is the Code of Professional Responsibility*, 57 N.C.L. REV. 497 (1979). Professor Sutton was the Reporter for the ABA Special Committee on Evaluation of Ethical Standards which drafted the *Model Code*.

127. *Id.* at 514.

128. *Id.*

129. *Id.* at 514-16. See Lindgren, *Toward a New Standard of Attorney Disqualification*, 1982 AM. B. FOUND. RESEARCH J. 421. In its response to the SEC's request for comments, the ABA distinguished disciplinary rules from ethical considerations, citing the administrative law judge's ruling in *In re Carter*, [1979 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,175 at 82,181-84 (Mar. 7, 1979), *rev'd*, [1981 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,847 (Feb. 28, 1981). ABA Section of Corp., Banking and Business Law, Statement Pursuant to Securities Exchange Act Release No. 15,724, at 14-17 (July 3, 1979) (on file with the *Case Western Reserve Law Review* and the ACUS). According to the statement, the administrative law judge made no finding which supported a violation of disciplinary rules, but rather extensively discussed alleged violations of ethical considerations. *Id.* The statement concluded by voicing its disagreement with the administrative law judge's conclusion that an attorney is required

as a matter of competence, professional responsibility or securities law compliance to bring disagreements with management as to legal matters to the attention of his client's board of directors, at least in the absence of knowledge by a lawyer of a conflict between the interests of the corporation and those of the officers with whom he deals.

Id. at 17.

regulate the practice of law reflect a delicate balance between "regulatory laws, standards of *recommended* normal *professional practices*, and *ethical* norms of *aspirations* and professional objectives."¹³⁰ Dean Sutton recommended a revision of the Model Code in which future disciplinary standards would be "realistic and susceptible of uniform, regular enforcement."¹³¹

A single, uniform statement of standards of professional responsibility for attorneys is not possible in the United States because of the myriad authorities adopting these standards. Yet the legal profession does have a basic norm to govern its conduct: The Model Code of Professional Responsibility or its successor. This norm reflects the beliefs of a significant segment of the legal profession at a particular point in time on the proper balance between regulatory laws, recommended professional practices, and ethical aspirations. Permitting a federal agency to operate outside this general framework by allowing it to impose ad hoc substantive, regulatory laws would seem divisive. In addition, attorneys practicing before the agency could be placed in conflict with mainstream standards of professional responsibility or in violation of standards set by licensing authorities.¹³²

It is interesting that the SEC in *Carter* declined to make use of the Model Code's disciplinary rules in evaluating the conduct of the respondents and instead announced a new interpretation of rule 2(e) which apparently is not grounded in the Model Code. See [1981 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,847, at 84,170 n.65.

130. Sutton, *supra* note 126, at 517 (emphasis added).

131. *Id.*

132. See, e.g., Letter from John F. Sutton, Jr. to the author (May 4, 1982) (on file with the *Case Western Law Review* and the ACUS). Dean Sutton stated:

At the time the Wright Committee was preparing the Code of Professional Responsibility, the members of the Committee definitely thought the Code should apply to all conduct of all lawyers in all situations before all bodies. In other words, they intended for the disciplinary rules to constitute the regulatory law but realized, of course, that the disciplinary rules would be effective only when adopted by an authority having jurisdiction to discipline lawyers. In addition to the Supreme Court of each state, they thought, I believe, that the federal courts would use the rules in that fashion; and at least, I am sure that Justice Charles Whitaker so believed. At the same time, they felt it would be divisive and would probably present conflicting standards to lawyers if agencies (whether State or Federal) adopted separate disciplinary or regulatory law. On the other hand, obviously different agencies proceed in varying ways and professional norms might well differ when practicing before various kinds of courts and agencies. . . .

My own belief is that agencies should not adopt separate administrative codes for conduct of lawyers but should seek to amend the Code or the Model Rules if a change is desirable.

Id. at 1; see also Letter from Andrew L. Kaufman to the author (May 24, 1982) (on file with the *Case Western Reserve Law Review* and the ACUS). Professor Kaufman stated:

My primary concern is that practicing lawyers not be subjected to conflicting standards of professional conduct. It is difficult enough for lawyers to figure out what their obligations to their clients and to society are without at the same time

In 1975, Justice Potter Stewart recognized that until society defines the role of a business lawyer, it cannot determine "what ethical judgments are best left in the public interest—not to a code of professional responsibility, but to individual conscience."¹³³ Two years earlier in *In re Griffiths*,¹³⁴ the majority and dissenting members of the Supreme Court reaffirmed the special relationship between attorneys and government. Justice Powell delivered the opinion of the Court and noted that although attorneys often are considered "'officers of the court' . . . an attorney [is] not an 'officer' within the ordinary meaning of that term."¹³⁵ Justice Powell pointed out that although attorneys do "occupy professional positions of responsibility and influence that impose on them duties correlative with their vital right of access to the courts[,] they are [neither] officials of government [nor] formulator[s] of government policy."¹³⁶ The two dissenters, especially Chief Justice Burger, agreed with the majority on this point:

Whatever the erosion of the officer-of-the-court role, the over-

being subjected to multiple varying standards from different bodies that may have some authority over them. As the practice of law is currently organized, the codes of professional responsibility presently adopted in the various states represent the primary sources of lawyers' obligations. I understand the concerns that impel various state and federal agencies to consider the imposition of additional obligations. It may be that there are truly unique circumstances that might justify particular agencies in adopting rules to cover particular situations that are left uncovered by those codes. Most such proposals, however, while they may involve special situations, also involve the possibility of concurrent application of the state law of professional responsibility, and I am fearful that any opening of the door to so-called "special situations" will result in the promulgation of many rules that will put lawyers who genuinely care about their professional duty in very difficult situations.

Id. at 1. Professor Kaufman is the author of *A. KAUFMAN, PROBLEMS IN PROFESSIONAL RESPONSIBILITY* (1976).

133. Stewart, *Professional Ethics for the Business Lawyer: Morals of the Market Place*, 31 BUS. LAW. 463, 468 (1975). Justice Stewart also raised a number of related questions:

[A]side from the inescapable responsibility that his profession places upon every lawyer to act as a wholly honorable and trustworthy person and a good law abiding citizen, is there any way in which a business lawyer can better serve the public interest than by giving the best possible legal advice to his clients? Is it the duty of a lawyer, by contrast, to try to impose upon his clients his own notions of social, or political or economic morality? Is it indeed even "ethical" for him to try to impose his own system of moral priorities and social values on his clients' business decisions, in the guise of neutral legal advice? ·

Id.

134. 413 U.S. 717 (1973) (holding that exclusion of resident aliens from practice of law is unconstitutional).

135. *Id.* at 728-9 (quoting *Cammer v. United States*, 350 U.S. 399, 405 (1956)); *see also Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1866) (discussing meaning of attorneys as "officers of the court").

136. 413 U.S. at 729.

whelming proportion of the legal profession rejects the alien idea that [an attorney] is an agent of government. . . .

The very independence of the lawyer from the government on the one hand and client on the other is what makes law a profession, something apart from trades and vocations in which obligations of duty and conscience play a lesser part. It is as crucial to our system of justice as the independence of judges themselves. . . .

. . .

In some countries the legal system is so structured that all lawyers are literally agents of government and as such bound to place the interests of government over those of the client. That concept is . . . alien to our system¹³⁷

The legislative history of the Agency Practice Act¹³⁸ supports the statement in *Touche Ross* that the SEC has implied authority to promulgate standards "to protect the integrity of its administrative procedures."¹³⁹ The court's further conclusion that the SEC has implied authority to prescribe professional standards "to protect . . . the public in general,"¹⁴⁰ however, overstates the power of the SEC, and could lead to attempts like that of the SEC in *Carter*: enlistment of attorneys as agents of the government.¹⁴¹ Commissioner Karmel insisted that use of rule 2(e) to implement a professional protection program exceeds the disciplinary powers

137. *Id.* at 732, 733. The other dissenter, Justice Rehnquist, recorded his thoughts in a companion case to *Griffiths*, *Sugarman v. Dougall*, 413 U.S. 634, 649 (1973).

138. 5 U.S.C. § 500 (1982).

139. 609 F.2d at 582. In light of this legislative history, one can reasonably conclude that Congress intended to leave with federal agencies the authority to promulgate "traditional" standards of professional conduct relating to maintenance of order in and integrity of agency proceedings. The SEC's opinion in *Carter* contains a representative sample of the legislative history on this point:

For example, in discussing the bill which ultimately was enacted, Congressman Willis stated that "[i]t does not affect the power of agencies to discipline persons who appear before them." . . . Similarly, Representative Poff remarked: "The bill in no way modifies the authority of agencies to discipline persons before them." . . . Further, the Senate Report on this proposed law stated: "If matters of ethical conduct are brought to the attention of the agencies, adequate tools are at their disposal to deal with the situation." . . . And, in a letter to Senator Eastland, then Deputy Attorney General Katzenbach confirmed the Administration's understanding that the bill "does not modify the authority of agencies to discipline persons appearing before them." He remarked that the Department of Justice "ha[d] eliminated formal admission procedures and special examinations for practice before the administrative boards and agencies under its supervision. The Department, however, has retained the power to discipline attorneys." Further, after noting that "[t]he bill retains in Federal agencies an element of control, particularly in disciplinary situations," he concluded that, "[s]ubject to the foregoing, the Department favors enactment of the measure."

[1981 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,847 at 84,148 n.9 (citations omitted).

140. 609 F.2d at 582.

141. See *supra* notes 102-04 and accompanying text.

of the SEC and opens a "Pandora's Box of misguided standard-setting regulation."¹⁴² Although the SEC may currently be in the process of reassessing its approach to regulating attorneys who practice before it,¹⁴³ this assessment may change with future personnel changes. Not to be overlooked, however, is that other agencies may seize on the language of *Touche Ross* and enact similar attorney regulations. Congress should therefore amend the Agency Practice Act to clarify the authority of those agencies which depend on implied powers to regulate the attorneys practicing before them. Congressional resolution of the authority issue would also satisfy the ABA's need for clear statements on attorney conduct standards and disciplinary responsibility.

C. *Congressional Alternatives for the Regulation of Standards*

Congress has several regulatory alternatives if it decides to address the need for standards of conduct for attorneys practicing before federal agencies.¹⁴⁴ Congress could choose to renounce its authority and defer to state regulation, although positive federal regulation appears more likely.¹⁴⁵

142. *Keating*, [1979 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,124 at 81,997 (use of rule 2(e) to implement program of professional protection is not limiting its disciplinary powers to assuring proper administration of justice). Commissioner Karmel described *Carter* with similar disapproval. See *Karmel Blasts SEC Discipline of Lawyers*, 67 A.B.A. J. 1097 (1981).

Thomas Lumbard has suggested an approach which would facilitate greater supervision of attorney conduct in the securities area:

The solution to many of the agencies' problems, it seems to me, is more imaginative use of their power to regulate "practice and procedure," *qua* practice and procedure, rather than the power to regulate the conduct of practitioners. If the SEC wants lawyers to make inquiries not normally required of counsel for parties, the SEC can require that certain papers must be accompanied by an affidavit of counsel that such inquiries have been made, and that counsel is satisfied that the statements in the prospectus, or the 10-K, or the annual report, are neither false nor misleading. A lawyer would be disbarred for making a false affidavit of that sort to the SEC, just as a lawyer would be disbarred for making a false certificate of good faith in a federal court that required a pleading to be accompanied thereby.

Letter from Thomas Lumbard to the author 5 (Apr. 12, 1982) (on file with the *Case Western Reserve Law Review* and the ACUS).

143. See, e.g., Address by SEC General Counsel Edward F. Greene, New York County Lawyers' Association (Jan. 13, 1982), *reprinted in* Legal Times (Wash.), Jan. 25, 1982, at 25, col. 1.

144. See *supra* notes 28-32 and accompanying text, for a discussion of Congress' authority to regulate attorney conduct before administrative agencies.

145. Speakers before the 1982 ABA House of Delegates who favored the Franck Proposal, *supra* note 6, forcefully pointed out that Congress was unlikely to leave all attorney regulation to the states. Congress could also adopt legislation holding an attorney appearing before a federal agency to the standards of the state in which he is licensed to practice.

Express authorization to each federal agency to adopt its own standards would likely be the simplest and least costly alternative. This option, however, might result in balkanization of standards among the profusion of federal agencies, proscriptions potentially inconsistent with the overall responsibilities of attorneys, and potential enlistment of attorneys to enforce substantive law via ethical standards. A superior, albeit costlier, alternative would be congressionally mandated uniform standards, with the possibility of additional standards necessitated by individual agency requirements.¹⁴⁶

Uniform standards might best solve the problems posed by individual agency regulation, but they would probably increase the complexity and cost of controlling attorney conduct. A lack of data on the extent and nature of attorney misconduct makes difficult a determination of whether such complex and costly regulation is justified. Extensive misconduct may exist but agencies often fail to document it.¹⁴⁷ For example, instances of attorney misconduct before the SEC are not recorded and filed separately

This system, however, would engender inconsistency and confusion since attorneys in the same proceeding could be held to different standards of conduct. Thus, standards should be promulgated, if at all, by an authority on the federal level. Federal control of attorneys is not a new idea, as was pointed out to the 1982 ABA House of Delegates, since attorneys are subject to the disciplinary standards of federal courts.

146. Of the federal agencies responding to the Federal Questionnaire, *see supra* note 77, approximately 66% indicated that uniform standards were unnecessary. *See infra* appendix A, question 8; *supra* note 13. In addition almost 50% said that they had enacted satisfactory particularized standards for their agencies. *See infra* appendix A, questions 3 & 5; *supra* note 13. On the other hand, if uniform standards were promulgated, almost 70% of those responding believed that no agency should be exempted from the uniform standards. *See infra* appendix A, question 10; *supra* note 13.

If uniform standards were promulgated, agencies should be permitted to present their requirements for particularized standards. Prohibition of particularized standards at the outset would oversimplify the complexities facing agencies. *See, e.g.,* Marquis, *An Appraisal of Attorneys' Responsibilities Before Administrative Agencies*, 26 CASE. W. RES. L. REV. 285, 290-314 (1976).

147. *See* ABA Nat'l Center for Professional Responsibilities, Attorney Misconduct Before Eleven Federal Agencies (Mar. 10, 1982) (included *infra* appendix C) (illustrating difficulties in documenting misconduct). Of the 36 licensing authorities that responded to the State Questionnaire, over 25% said that they had no statistics on misconduct by attorneys before federal agencies and over 20% failed to answer this question, which suggests an absence of data. *See infra* appendix B, question 11; *supra* note 13.

As with admission to practice before federal agencies, *see supra* notes 95-99, information on attorney misconduct is valuable to the agencies, clients, and practitioners. In 1968, the ABA Board of Governors established the National Discipline Data Bank to compile data on attorney misconduct. The ABA Center for Professional Responsibility currently administers the Data Bank. Letter from Pamela L. Ross, Data Bank Adm'r, to National Discipline Data Bank Reporting Authorities 1 (Feb. 1983) (on file with the *Case Western Reserve Law Review*).

but remain buried in the SEC general files.¹⁴⁸

Although Congress has the authority, it should not draft and enact standards itself.¹⁴⁹ Congress is not the appropriate group to undertake deliberations of the nature and potential duration required to produce professional guidelines. Standards of conduct for the practice of law should not be drafted in the political and partisan atmosphere of Congress. The process should be a concentrated effort not subject to preemption by more urgent matters. In addition, noncongressional promulgation would provide greater flexibility for the agencies and the legal profession than rigid statutory guidelines. Congress, therefore, should delegate the responsibility for formulating standards of conduct, ensuring only that any standards ultimately adopted are within the mainstream of current legal thinking on professional responsibility. Possible delegates include the federal judiciary, an *ad hoc* body, or a new or existing agency.

Delegation to the federal judiciary would be inappropriate, despite that branch's experience with attorney discipline. The issue in question is not misconduct by judicially admitted attorneys before federal courts, but rather misconduct by congressionally admitted attorneys before federal agencies.¹⁵⁰ Some of the objec-

Conversations between various agency personnel and the author have indicated that information regarding disciplinary action by one agency is not being received by other agencies. A need remains, therefore, to establish such a mechanism. One possible and, quite probably, low-cost solution would be to designate the Office of Government Ethics as a central clearinghouse for such information. See *infra* notes 153-58 and accompanying text. The Office would be authorized to require each agency to provide information on all attorney misconduct proceedings involving that agency. The Office then would compile and publish the information in the Federal Register. The availability of this data also should improve the ability to assess the effectiveness of imposed standards and disciplinary mechanisms.

148. The SEC has begun to review its files to identify instances of potential attorney misconduct; the results are not yet available. See Letter from Stephan E. Canan to the author 2 (May 13, 1982) (on file with the *Case Western Reserve Law Review* and the ACUS). Subsequent oral communications between the author and Paul Gonson, SEC Solicitor, indicate that the review is not yet completed.

149. The Federal Questionnaire asked agencies to choose among alternative promulgators of uniform standards: the ABA, the federal courts, Congress, an *ad hoc* group of attorneys and agency personnel, or another group. See *infra* appendix A, question 9; *supra* note 13. Although the responses were somewhat inconclusive, general counsels gave little support to congressional promulgation, while chief administrative law judges tended to prefer Congress.

150. Although the Agency Practice Act, 5 U.S.C. § 500 (1982), provides that an attorney licensed by and currently in good standing with a state court may practice before federal agencies, a state license is not in and of itself the authority enabling an attorney to practice before federal agencies. Congress theoretically could have set some other requirement such as a federal bar examination. Indeed, a state license to practice law does *not*

tions to congressional enactment of standards are equally applicable to judicial promulgation: The process could be lengthy and partisan in nature, and involve resources beyond those reasonably available to the judiciary. The judiciary itself has resisted the responsibility of promulgating standards.¹⁵¹

Formation of an *ad hoc* body to promulgate standards suffers the severe shortcoming of being temporary. Ideally the body should be available to make changes in and issue interpretations of standards as the need arises. An *ad hoc* group would likely promulgate and then disband, and thus could not perform ongoing responsibilities.¹⁵²

Establishment of a new agency is not financially justified at this time, given the absence of clear documentation of attorney misconduct before federal agencies. Nevertheless, assigning the responsibilities to an existing agency with expertise in the area of ethical standards would seem appropriate. Ideally an agency with established personnel, procedures, and experience could perform the required rulemaking and ongoing responsibilities without a prohibitive increase in funding. This agency arguably exists.

In 1978, Congress created the Office of Government Ethics,¹⁵³ *inter alia*, to "centralize executive branch responsibility for enforcement . . . ; provide guidance to agencies; issue clear and understandable standards of conduct . . . ; [and] provide advisory opinions."¹⁵⁴ The Office's statutory objective is to "prevent . . . conflicts of interest on the part of officers and employees of any executive agency, as defined in Section 105 of Title 5."¹⁵⁵ Section 105's definition of "executive agency" includes so-called "in-

entitle a person to practice before the Patent and Trademark Office; Congress empowered that agency to impose its own requirements. *See* 5 U.S.C. § 500(e) (1982).

151. The judges of the United States District Court for the District of Columbia unanimously rejected the Franck Proposal's recommendation that the judiciary promulgate uniform standards. *See* Letter from Chief Judge John Lewis Smith, Jr. to Jeanne P. Gray (Mar. 5, 1982) (on file with the *Case Western Reserve Law Review* and the ACUS). Federal Questionnaire responses reflected little support for judicial promulgation of uniform standards. *See infra* appendix A, question 9; *supra* note 13.

152. The responses of general counsels to the Federal Questionnaire indicated some support for promulgation of federal standards of conduct by an *ad hoc* group of attorneys and agency personnel. *See infra* appendix A, question 9; *supra* note 13. The other possible *ad hoc* groups found little support. The most popular "other" selection was the ACUS. *See supra* note 149.

153. Ethics in Government Act, Title IV, § 401, 5 U.S.C. app. § 401 (1982).

154. S. REP. NO. 170, 95th Cong., 2d Sess. 30, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 4246, 4247.

155. 5 U.S.C. app. § 402 (1982).

dependent establishments," such as the SEC.¹⁵⁶ The Office of Government Ethics has promulgated uniform standards of ethical conduct through the Office of Personnel Management (OPM).¹⁵⁷ These regulations require that each agency promulgate its own standards containing at minimum the uniform standards, as well as any additional standards not inconsistent with the uniform standards and "appropriate to the particular functions and activities of the agency," subject to OPM approval.¹⁵⁸ The use of the Office of Government Ethics—an existing agency with expertise in the area of ethical standards—seems to be the least expensive and most attractive choice.

Selecting the best promulgator of standards is important because professional responsibility for attorneys benefits both the legal profession and the public. In recent years, beginning with the revelations of attorney misconduct associated with Watergate, attorney ethicality and professionalism have been called into question. By placing responsibility for professional standards with the Office of Government Ethics, Congress can send a message to the American public that the federal government is serious about requiring attorneys at the federal level to be professional and ethical. Congress should amend the Agency Practice and Ethics in Government Acts to assign to the Office of Government Ethics responsibility for developing and monitoring uniform standards of conduct for attorneys practicing before all federal agencies.¹⁵⁹

156. "For purposes of this title, 'Executive agency' means an executive department, a Government corporation, and an independent establishment." *Id.* § 105. The legislative history of the 1979 amendments to the Ethics in Government Act clearly indicates that this definition of "executive agency" includes independent regulatory commissions such as the SEC. *See* H. REP. NO. 114, 96th Cong., 1st Sess. 3, *reprinted in* 1979 U.S. CODE CONG. & AD. NEWS 145.

157. *See* 5 C.F.R. § 735 (1983).

158. *Id.* § 735.104(a), (f).

159. The responsibility for promulgating and monitoring the standards should be assigned to the Director of the Office of Government Ethics through legislation similar to §§ 402-04 of the Ethics in Government Act, 5 U.S.C. app. §§ 402-04. Section 405 of the Act, *id.* § 405, should be amended to ensure adequate appropriations. *See infra* note 216. The standards promulgated should be published in the Code of Federal Regulations and should be uniform except for additional standards designed to meet special needs of particular agencies and approved by the OPM.

Were the standards of conduct also applied to government attorneys, the Director of the Office of Government Ethics should then be responsible for receiving, filing, and prosecuting misconduct charges against agency staff attorneys, through amendment of §§ 402-04 of the Act, 5 U.S.C. app. §§ 402-04. *See infra* note 216. *See also* Letter from Professor Peter L. Strauss, Columbia Law School, to the author 2 (May 6, 1982) (on file with the *Case Western Reserve Law Review* and the ACUS) (discussing OPM participation in adjudicating complaints of attorney misconduct).

The Office should implement this function in the same manner as it has carried out its responsibilities relating to conflict of interest standards.

D. *Standards of Conduct for Nonlawyers and Agency Attorneys*

Any uniform standards drafted to define the professional conduct of attorneys practicing before federal agencies must address a number of related issues. One is whether laypersons permitted to appear before a particular federal agency should be subject to the same standards of conduct as attorneys. Although this Article is not intended to discuss regulation of laypersons,¹⁶⁰ Congress could apply these proposals to nonlawyers as well.

In 1975, Joseph Daley and Roberta Karmel noted that the SEC maintains a double standard by expecting private practitioners to assume duties shirked by its own staff attorneys.¹⁶¹ This observation raises two issues: (1) whether uniform standards should apply to both private practitioners *and* government attorneys and (2) whether a government attorney can be prohibited from practicing before federal agencies due to dismissal for misconduct by his employer despite lack of action on the misconduct by his state licensing authority.¹⁶² The Agency Practice Act appears to apply the same standards to both private practitioners and government attorneys by requiring only that the attorney be a member in good standing of a state bar to practice before a federal agency.¹⁶³ Subjecting government attorneys to the same standards as private

160. Jonathan Rose of Arizona State University College of Law, as a consultant for the ACUS, is currently studying the regulation of nonlawyers practicing before federal agencies.

161. Daley & Karmel, *supra* note 122, at 812.

162. The observations made are not limited to private practitioners not subject to the local discipline authority, but apply with equal force to government attorneys not employed within their licensing states.

163. 5 U.S.C. § 500(b) (1982). The Act may permit prohibiting a dismissed agency attorney from practicing before the dismissing agency. *See id.* § 500(d)(3) (Act does not "authorize an individual who is a former employee of an agency to represent a person before an agency when the representation is prohibited by statute or regulation"). The sparse legislative history on this section, however, indicates that the exception was included so as not to "modify the authority of agencies to . . . prevent former employees from representing persons appearing before the agencies to *avoid conflict-of-interest situations*." Letter from Nicholas deB. Katzenbach to Sen. James O. Eastland (June 10, 1963), *reprinted in* 1965 U.S. CODE CONG. & AD. NEWS 4178 (emphasis added).

Professor Weckstein also concluded that the purpose of this section was to avoid conflicts of interests. Weckstein, *supra* note 75, at 65-66. Thus, it is unclear whether an agency may deny eligibility to practice before it to a dismissed employee whose appearance would *not* create a conflict of interest. *See supra* notes 62-65 and accompanying text.

practitioners might eliminate the double standard discussed by Daley and Karmel.¹⁶⁴

Unique ethical quandaries may arise when an administrative agency deals with clients of private practitioners. Response to such situations may depend on whether the attorney is in-house or retained counsel.¹⁶⁵ It is unclear whether the ABA *Model Code of Professional Responsibility* or its successor adequately resolves these problems or whether special standards are required. Furthermore, one must inquire whether the ABA recommendations on professional responsibility are too much of a compromise work product produced by a "political adoption process"¹⁶⁶ or emphasize too strongly the adversary environment of trial-oriented law practice to resolve the problem.¹⁶⁷ Either characteristic may render the recommendations unsuitable as a model for uniform standards of conduct for attorneys practicing before federal agencies.

E. *Potential Conflicts Between State and Federal Standards*

The promulgating federal authority must assess the impact of subjecting an attorney practicing before federal agencies to professional standards greatly at variance from those of his licensing state(s). If a conflict between state and federal standards exists, an attorney may choose the stricter standard to insure avoidance of disciplinary action. This approach assumes that an attorney knows he is subject to both standards. Consider an attorney far removed from Washington, D.C., who gives a client advice involving a federal agency. Does that act of advising bring the attorney within the coverage of federal standards? If it does, would the attorney be reasonably expected to understand that giving the advice subjects him to another professional responsibility regulatory system? The group authorized to promulgate these standards, whether it be *ad hoc* or an existing agency, must resolve these issues.

As a basic threshold issue, the promulgators of the standards must determine the types of misconduct to which federal uniform

164. If federal agencies are to have the authority to deny eligibility to an attorney disciplined by a federal agency, Congress must amend the Agency Practice Act. *See supra* note 94.

165. *See* Pickholz, *supra* note 108, at 1854-55; Subak, *Special Problems of Inside Counsel*, 33 BUS. LAW. 1433 (1978).

166. Sutton, *supra* note 126, at 497.

167. Marquis, *supra* note 146, at 285.

standards should apply. Misconduct generally falls into three categories. The narrowest and most easily defined category is contumacious behavior committed during a specific agency proceeding. The Waxman/Forrest Proposal¹⁶⁸ addresses this form of misconduct, limiting application of federal standards to situations "affecting [an] attorney's participation in a particular proceeding before it, as immediately necessary to maintain order in and assure the integrity of such proceeding."¹⁶⁹ A second, arguably broader category of misconduct includes actual and representative appearances before an agency. The Franck Proposal covers this category, applying federal standards to "Direct Appearances[—] an actual appearance before the agency in a hearing or similar proceeding or the filing with an agency of a document which is signed by, or otherwise submitted on the authority of the practitioner."¹⁷⁰ The third and most controversial category of potential misconduct involves an attorney's duty to conform to standards involving an agency's substantive regulatory responsibilities. The SEC in *Carter* defined this duty during its discussion of an attorney's duty to encourage clients to comply with securities law disclosure requirements.¹⁷¹

An agency's subjection of an attorney to standards of conduct and discipline without adequate notice of the regulatory system's jurisdiction has constitutional overtones.¹⁷² The United States Supreme Court consistently has held that the right to practice law may not be taken away without due process¹⁷³ and that due pro-

168. See *supra* note 7.

169. Waxman/Forrest Proposal, *supra* note 7, at 2. Some courts and commentators have argued that individual agencies should be permitted to adopt their own standards for this type of misconduct. See, e.g., *Camp v. Herzog*, 104 F. Supp. 134 (D.D.C. 1952) (discussing NLRB's power to regulate admission to practice before it, based on misconduct during a proceeding). Such opinions undermine the objective of uniform standards. No compelling reason exists to treat standards governing contumacious behavior differently than other standards, especially if individual agencies can adopt additional standards on a showing of necessity. See *supra* note 159.

170. See Franck Proposal, *supra* note 6, at 4. Rule 3 of this proposal, however, cautions that "[t]he jurisdiction conferred by these rules shall not be construed to deny to any agency the powers immediately necessary to maintain control over its proceedings." *Id.* at 10.

171. [1981 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,847 at 84,172. See *supra* notes 102-08 and accompanying text for a discussion of the *Carter* rationale.

172. For a discussion of the notice of jurisdiction requirement, see R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 4.4 (2d ed. 1980).

173. See, e.g., *In re Ruffalo*, 390 U.S. 544, 550-52 (1968); *Theard v. United States*, 354 U.S. 278, 282 (1957); *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 238-39 (1957); *Ex Parte Robinson*, 86 U.S. (19 Wall.) 505, 512 (1873).

cess necessarily includes adequate notice.¹⁷⁴ Standards that assume that every attorney who has a client with an administrative law question has the responsibility and practical ability to review all the applicable rules and regulations prior to giving any advice, oversimplify the realities of practicing law. Many attorneys do not have ready access to either the *Code of Federal Regulations* or the *Federal Register*. The dividing line between applicability of federal and state standards of conduct must satisfy due process and will do so only if that line is readily recognizable. Where federal and state standards conflict, the proper response is not necessarily to apply the strictest standard but rather to apply federal standards where they may constitutionally be applied and state standards elsewhere. Violations of federal standards should be pursued in a federal forum, leaving enforcement of state standards to the states.

IV. DISCIPLINE OF ATTORNEYS PRACTICING BEFORE FEDERAL AGENCIES

Standards without effective enforcement benefit no one. The final aspect of attorney regulation, therefore, involves choosing an appropriate disciplinary body or mechanism to sanction violators of federal conduct standards. Officials at the SEC have indicated "that federal administrative agencies are unlikely to voluntarily cease the disciplining of attorneys and other professionals for misconduct unless a substitute mechanism that is truly effective becomes available."¹⁷⁵ On the other hand, the SEC does "not oppose the creation of an independent model disciplinary mechanism [as] such a body would relieve the agencies of the need to devote their scarce resources to this task."¹⁷⁶

A. *The Recommendations of the Franck and Waxman/Forrest Proposals*

Both the Franck and Waxman/Forrest Proposals recommended new disciplinary procedures.¹⁷⁷ The House of Delegates

174. See, e.g., *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

175. Ferrara/Gonson Proposal, *supra* note 23, at 3.

176. Letter from Paul Gonson to Michael Franck 1 (July 28, 1982) (on file with the *Case Western Reserve Law Review* and the ACUS). The letter reiterated the position taken earlier by SEC officials that any nonagency disciplinary mechanism must be "truly effective."

177. See *supra* notes 6-7.

adopted the Waxman/Forrest Proposal's recommendation,¹⁷⁸ which is considerably shorter and less complicated than that of the Franck Proposal.¹⁷⁹

The underlying concept of the Waxman/Forrest Proposal was the use of *state* disciplinary mechanisms to pursue allegations of conduct proscribed by *state* standards committed by attorneys practicing before federal agencies.¹⁸⁰ Although emphasis on state regulation may appeal to a state-oriented body like the ABA House of Delegates, Congress is unlikely to abandon its power in this area without convincing evidence that state regulation would be effective.¹⁸¹ Implementation of the Waxman/Forrest Proposal

178. The Waxman/Forrest Proposal endorses the enactment of legislation which would provide that: . . .

1. Except as existing legislation expressly provides, no federal agency shall adopt standards of practice to govern the professional conduct of attorneys who represent clients subject to the administrative procedures of or regulation by that federal agency, except such standards of practice as required to apply subparagraph 2(b) below to maintain order in or assure the integrity of proceedings before it.

2. Except as existing legislation expressly provides, a federal agency shall exercise disciplinary authority over an attorney only:

(a) in conformity with formal disciplinary action taken against such attorney in a jurisdiction where such attorney is admitted to practice; or

(b) affecting such attorney's participation proceeding in a particular proceeding before it, as immediately necessary to maintain order in or assure the integrity of such proceeding.

FURTHER RESOLVED, That the American Bar Association recognizes that it is important that state disciplinary authorities afford federal agencies an effective means of securing review of charges by such federal agencies of professional misconduct arising out of the practice of attorneys before the agencies; and that it is a matter of clear and important policy of the American Bar Association to encourage and assist state disciplinary authorities to fulfill this function.

FURTHER RESOLVED, That the American Bar Association authorizes the Standing Committee on Professional Discipline to initiate and coordinate efforts to assure that state disciplinary authorities function in a manner which provides federal agencies with an effective forum to which professional responsibility complaints arising out of agency practice can be brought; and, to this end, the Standing Committee shall establish liaison with appropriate state bar associations or other groups within each state which would directly undertake these efforts at the state level.

Waxman/Forrest Proposal, *supra* note 7, at 1-2.

179. Although the recommendation in the Franck proposal was less than a half page, it incorporated by reference nine definitions and twenty-four proposed "Rules for Federal Agency Discipline," and thus is not reproduced here. See Franck Proposal, *supra* note 6, at i, 4-46.

180. See Waxman/Forrest Proposal, *supra* note 7, at 1-2.

181. Proponents of the Franck Proposal raised this concern during the debate of the Waxman/Forrest Proposal on the floor of the ABA House of Delegates. The references to the House of Delegates' discussion of the Franck and Waxman/Forrest Proposals are based on the author's observations of the debate. See *supra* note 13. In particular, they argued that uniform federal standards would ensure that attorneys from different states would be subject to the same standards, rather than differing state standards, when practicing before federal agencies.

thus does not realistically commend itself.

The Franck Proposal's main features can be described briefly: (1) in general, removal of federal agencies' jurisdiction to conduct attorney misconduct proceedings, (2) referral of complaints of attorney misconduct before federal agencies to the bar counsel of the attorney's licensing state, who would investigate the charges and prosecute the case before an appropriate United States district court, and (3) promulgation of uniform standards of conduct by the United States District Court for the District of Columbia.¹⁸² Two positive contributions of the Franck Proposal were identification of a forum to adjudicate allegations of attorney misconduct before federal agencies, i.e., federal district court, and recognition that as a general principle the federal agencies should not promulgate standards of conduct.

The Franck Proposal's suggested methods of implementation, however, included a number of features which reduced its overall attractiveness. Foremost was its use of *state* bar counsels to investigate and to prosecute alleged violations of *federal* standards. Eighty-six percent of the jurisdictions responding to the State Questionnaire indicated that they "*only* [had] authority to investigate, discipline, etc. an attorney licensed to practice by [their] state for a violation of a standard adopted by some official body (e.g., court, legislature, bar association) of [their] state."¹⁸³ In other words, the overwhelming majority of bar counsel responding does not appear to have authority to use state resources to enforce federal standards, thus undermining a fundamental part of the Franck Proposal. The Waxman/Forrest Proposal pointed to the same problem but from a different perspective:

While Congress can condition the grant of federal funds upon state adoption and enforcement of related state laws (e.g., conditioning highway funds upon state adoption and enforcement of a 55 mph speed limit), it is extremely doubtful that Congress can require the states to use their executive powers to enforce a *federal* law or regulation. . . . Thus, even if Congress were to adopt the . . . extraordinary provision that with regard to the federally adopted standards state disciplinary enforcement authorities "shall . . . [p]erform all prosecutorial functions including investigation," it is questionable whether those

Concern over the "hiatus in the effective discipline of many lawyers in the Administrative Law practice" is not new. HOOVER COMMISSION TASK FORCE REPORT, *supra* note 20, at 308; see CLARK REPORT, *supra* note 21, at 67-70. These concerns still appear to be warranted today. See *supra* notes 22-23 & 25.

182. Franck Proposal, *supra* note 6, at i, 5-46.

183. See *infra* appendix B, question 2; *supra* note 13.

authorities would have to comply.¹⁸⁴

Other objections to implementing the Franck Proposal included: (1) the fact that attorneys could still be required to enforce substantive agency policies and face conflicting state and federal standards, (2) the reluctance of the District Court for the District of Columbia to promulgate standards, (3) the lack of an authoritative source to monitor the standards, (4) the lack of uniformity of enforcement because state bar counsels would have significant prosecutorial discretion, and (5) the complexity of the "Rules for Federal Agency Discipline."¹⁸⁵ These concerns might have been overcome by congressional action. Their presence, however, reinforced the House of Delegates' inclination to adopt a strong, state-oriented position on discipline of attorneys practicing before federal agencies—the Waxman/Forrest Proposal.

The two proposals agreed in one major aspect: Except for misconduct affecting the order or integrity of a specific agency proceeding, authority to discipline misconduct before federal agencies should be removed from the agencies.¹⁸⁶ The two proposals differed, however, in that the proposal adopted by the House of Delegates excepts from this proscription agencies with express disciplinary authority—the Treasury Department and the Patent and Trademark Office¹⁸⁷—while the Franck Proposal does not. The primary reason for removing attorney discipline from substantive agencies is the corruption that can result from vesting one entity with both the responsibility to prosecute and the power to sanction attorneys appearing before it.¹⁸⁸ The practical reason for exempting Treasury and the Patent and Trademark Office is that they apparently do a good job and have the support of attorneys practicing before them.¹⁸⁹ As Congress has expressly granted these agencies the authority,¹⁹⁰ such delegations should not be disturbed without a compelling reason.

184. Waxman/Forrest Proposal, *supra* note 7, at 12 (quoting earlier draft of Franck Proposal). In an attempt to accommodate this criticism, the ABA House of Delegates amended the Franck Proposal to allow prosecution of alleged violations by district court bar members if state bar counsel declines to prosecute. *See supra* note 181.

185. These objections were raised during the ABA House of Delegates' debate on the Franck and Waxman/Forrest Proposals. *See supra* note 181.

186. *See supra* note 24 and accompanying text.

187. Waxman/Forrest Proposal, *supra* note 7, at 1, 8. At least one other agency has express authority. *See supra* note 116.

188. *See supra* notes 33–46 and accompanying text; Franck Proposal, *supra* note 6, at 2–3.

189. *See supra* note 45.

190. *See supra* notes 42–46 and accompanying text.

The issues involved in choosing an appropriate enforcement agent are similar to those involved in selecting an appropriate promulgator. The conclusion, arguably, should be similar: Deny the agencies authority to discipline attorneys unless Congress has expressly granted this power to a particular agency.

B. *Agencies' Opinions on a Centralized Authority*

Based on responses to the Federal Questionnaire, most agencies appear to oppose the removal of this authority from the individual agencies. Of the twenty-seven responses received, only four—the general counsels of the ICC and the Merit Systems Protection Board, and the chief administrative law judges of the ICC and the Food and Drug Administration—approved of the establishment of a centralized disciplinary authority.¹⁹¹ A given agency's disapproval of a centralized authority may be a function of that agency's low incidence of attorney misconduct, indicating either ignorance of the complexities involved in dealing with attorney misconduct or a well-founded belief that this authority is not needed. Only two responses opposing a centralized authority (other than Treasury and Patent and Trademark—both express authority agencies) were from personnel of agencies reporting more than two instances of attorney misconduct annually: the SEC and the Department of Health and Human Services.¹⁹² As a consequence, insofar as the views of the officials responding to the Federal Questionnaire reflect their agencies' positions, opposition to the concept of centralizing attorney discipline appears generally to come from agencies that do not have significant experience with the problem.

The responses of both the general counsel and the chief administrative law judge of the ICC, favoring a centralized disciplinary authority as well as uniform standards, are noteworthy.¹⁹³ The ICC has a long history of establishing and enforcing its own standards of conduct for attorneys practicing before it. In 1930, practitioners before the ICC adopted canons of ethics. These canons were adopted in turn by the ICC and remain, in revised

191. See *infra* appendix A, question 13; *supra* note 13.

192. See *infra* appendix A, question 19; *supra* note 13. The SEC chief administrative law judge's response opposing a centralized authority may not reflect the general consensus at the SEC. See *supra* notes 175-76 and accompanying text. The SEC general counsel did not return the questionnaire.

193. See *infra* appendix A, questions 13 & 8; *supra* note 13.

form, part of its rules governing practice.¹⁹⁴ Nonetheless, the acting director of the ICC's Office of Compliance and Consumer Assistance stated: "This office favors the creation of a centralized authority to handle attorney disciplinary matters. Ideally, such an office could process discipline cases more efficiently than the individual agency. It is our feeling that discipline cases demand an inordinate amount of the agency's enforcement effort."¹⁹⁵ The ICC thus appears to be the only responding agency which has significant disciplinary experience and yet favors the establishment of a centralized disciplinary authority.

C. *The Appropriate Entity To Discipline Attorneys*

The two proposals presented to the 1982 ABA House of Delegates differed substantially on the question who should take responsibility for attorney discipline if federal agencies do not. The Waxman/Forrest proposal adopted by the House of Delegates recommended state agencies; the Franck Proposal recommended an appropriate federal district court, with the bar counsel of the attorney's licensing state as prosecutor.

In 1980 when the ABA first began to consider these issues, one basic concern was the extent to which state agency staff and resources were inadequate to discipline federal agency practitioners.¹⁹⁶ This concern was never resolved.¹⁹⁷ Consequently, until the states can demonstrate the availability of adequate resources and the interest required to perform this function effectively, any recommendation to transfer this function to the states is premature and unlikely to gain congressional approval.¹⁹⁸ The responsibility for disciplining attorneys practicing before federal agencies,

194. See 49 C.F.R. § 1103.10-.35 (1983); *Code of Ethics of Practitioners Before the ICC*, 17 A.B.A. J. 73 (1931).

195. Letter from Bernard Gaillard to the author 1 (June 9, 1982) (on file with the *Case Western Reserve Law Review* and the ACUS).

196. 1980 ABA Standing Committee Report, *supra* note 22, at 5.

197. See *supra* notes 20-21 & 25 and accompanying text.

198. This was the conclusion of the proponents of the Franck Proposal. See *supra* note 181 and accompanying text. In addition, the public might misperceive such disciplinary action by the state bars:

[I]t would be inadvisable for the bar to seek legislation preventing agencies from instituting disciplinary rules. . . . At this time when voices are increasingly heard criticizing the bar's alleged self-protective posture, legislation which would prevent agencies from taking any steps toward disciplining wayward attorneys would be the wrong proposal at the wrong time.

Letter from Myron C. Baum to John S. Nolan 1-2 (Mar. 22, 1982) (on file with the *Case Western Reserve Law Review* and the ACUS).

therefore, should remain with the federal government, at least for the foreseeable future. The question is where.

If the agencies themselves are eliminated as adjudicators, two alternatives are available: a neutral body or the federal judiciary. Creation of a neutral centralized authority is not realistic due to the cost involved. The Office of Government Ethics would be an inappropriate choice, as adjudication of this nature is not within its current responsibilities and, thus, would require it to change its present focus significantly. The federal courts, however, have the support of the ABA Standing Committee on Professional Discipline¹⁹⁹ and others as an appropriate forum for disciplining attorney misconduct at the federal level. Dean Thomas D. Morgan, for example, has argued that the District Court for the District of Columbia may be the appropriate forum.²⁰⁰ In his view, discipline of attorneys has traditionally been a judicial function and is important enough to merit a federal court's attention. The additional burden on the court would be slight, since "the number of these cases would be small" and "most of the reciprocal disbarment cases would be straight forward [sic]"²⁰¹

A twenty-seven page legislative proposal circulated in 1981 by the general counsel and the solicitor of the SEC also recommends giving the federal courts responsibility for disciplining attorneys practicing before federal agencies.²⁰² This proposal contains many features relevant to this discussion. First, the complaining agency would initiate charges of attorney misconduct by filing them under seal with the appropriate United States district court. The court would examine the charges and accompanying documents in camera to determine whether to continue the proceeding. If the court terminated the proceeding, the charges and accompanying documents would remain nonpublic; if it found that the charges warranted further action, the charges would become public.²⁰³ Second, venue would lie "(1) where the agency has its prin-

199. Franck Proposal, *supra* note 6, at v.

200. Letter from Thomas D. Morgan, Dean, Emory University School of Law, to Margery H. Waxman 4 (Feb. 9, 1982) (on file with the *Case Western Reserve Law Review* and the ACUS).

201. *Id.* at 4-5; see also Ferrara/Gonson Proposal, *supra* note 23, at 5 (noting that cost to federal courts "would be so slight as to not warrant funding"); Agata, *Admissions and Discipline of Attorneys in Federal District Courts: A Study and Proposed Rules*, 3 HOFSTRA L. REV. 249, 282-84 (1975) (total reliance on state disciplinary mechanisms is impermissible and federal court involvement is needed to show leadership in tackling lay criticism of professional standards).

202. See Ferrara/Gonson Proposal, *supra* note 23, at 1.

203. *Id.* at 6.

cial office; (2) where the conduct occurred; (3) where the lawyer maintains an office; (4) where the lawyer resides; or (5) where the lawyer is licensed to practice law." The complaining agency would make the initial choice of venue, but the attorney would have an opportunity to change it.²⁰⁴ Third, agency disciplinary authority would not be withdrawn until two years after the effective date of the legislation granting jurisdiction to the United States district courts; i.e., concurrent jurisdiction would exist for two years.²⁰⁵

If the complaining agency is allowed to initiate charges and presumably to present the case in chief, an ethical conflict may be created for the attorney/defendant. In his own defense, he might be forced to reveal to the court confidential communications with a client.²⁰⁶ A federal district judge, however, should be able to prevent improper communication of this information, for example, by issuing a protective order or by receiving the testimony in camera. The alternative, appointing special prosecutors, probably would be prohibitively expensive and would not be necessary unless the courts are unable to prevent agencies from abusing their prosecutorial discretion in this regard.²⁰⁷ A requirement that the charges be delivered under seal and the documents be kept confidential until a federal district judge determines that the charges warrant further action serves an important purpose. It eliminates the alleged current practice of some agencies "to institute a public proceeding first and to investigate later."²⁰⁸

A flexible venue provision is preferable due to the difficulty of predicting a convenient forum for the parties.²⁰⁹ For example, a

204. *Id.* at 6-7.

205. *Id.* at 10.

206. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY, DR 4-101(c)(4) (1979) ("[A] lawyer may reveal . . . confidences or secrets necessary to . . . defend himself . . . against an accusation of wrongful conduct.").

207. If, in addition to private practitioners, agency attorneys were subject to the uniform standards and to the jurisdiction of federal district courts, *see supra* notes 161-64 and accompanying text, initiation of charges and presentation of the case in chief by agency personnel might be inappropriate. An independent party would then be required to initiate, receive, and act on complaints. *See supra* note 159; *infra* note 216.

208. Letter from Thomas Lumbar to Marcia L. Proctor 2 (Jan. 12, 1979) (on file with the *Case Western Reserve Law Review* and the ACUS); *see supra* note 14 and accompanying text; Franck Proposal, *supra* note 6, at 28.

209. *But see* Franck Proposal, *supra* note 6, at 7 (limiting venue to licensing state or district containing practitioner's principal office for agency practice); Letter from Thomas D. Morgan, Dean, Emory University School of Law, to Margery H. Waxman 5 (Feb. 9, 1982) (on file with the *Case Western Reserve Law Review* and the ACUS) (suggesting more limited venue provision).

case might involve an attorney who is licensed in Oregon, maintains his principal office or residence in Miami (perhaps a law professor or a retired attorney), and is charged with misconduct before the SEC regional office in Fort Worth. Which forum should be selected? Without more facts about the parties and the alleged misconduct, an intelligent choice is impossible. A flexible venue provision is necessary to accommodate these facts in a way that facilitates efficient and fair adjudication.

The two-year period of concurrent agency and judiciary jurisdiction before withdrawal of agency disciplinary authority seems advisable. The period of adjustment would permit an effective system of standards and disciplinary mechanisms to begin operating before the present system is extinguished, thus maintaining a continuous system of attorney discipline.

D. *Disciplinary Proceedings Remaining With The Individual Agency*

Should the federal district courts refrain from adjudicating some types of attorney misconduct? An agency should arguably retain the authority to discipline misconduct when the sanction imposed affects only the attorney's participation in the proceeding in which the misconduct occurred. This would allow an administrative law judge to exclude an attorney from a hearing because of contumacious behavior, or an agency to suspend an attorney for the remainder of a proceeding because the attorney filed a false affidavit. Misconduct involving the order or integrity of a particular proceeding can thus be handled expeditiously by the agency and would not seem to warrant judicial participation.²¹⁰ If an agency concludes that certain severe misconduct during a proceeding warrants sanctions extending beyond the immediate proceeding, it should file charges with the appropriate federal district court.²¹¹

A second type of misconduct arguably not warranting judicial participation is a summary proceeding to determine whether an agency should give reciprocity to the discipline imposed by another authority. Reciprocity hearings do not involve the same separation of functions problems as adjudications of original mis-

210. Both the Franck and Waxman/Forrest Proposals concluded that the agencies' disciplinary authority should be limited to misconduct that disrupts the order or integrity of their proceedings. Franck Proposal, *supra* note 6, at 10; Waxman/Forrest Proposal, *supra* note 7, at 7; see *supra* note 24 and accompanying text.

211. See, e.g., *Camp v. Herzog*, 104 F. Supp. 134 (D.D.C. 1952).

conduct.²¹² The agency adjudicator has not been personally offended and the adjudication determines only whether reciprocity should be granted. In addition, the agency is in a better position to decide whether the conduct prompting the previous disciplinary action warrants similar sanctions with respect to its own functions. Scant justification thus exists to consume valuable judicial resources with reciprocity hearings.

Although responses to the Federal Questionnaire were mixed, a substantial number of agencies did favor reciprocity.²¹³ Reciprocity should not, however, be automatic; an agency should conduct show-cause hearings which satisfy constitutional requirements prior to giving reciprocity.²¹⁴

These recommendations on the allocation of disciplinary authority between the agencies and the judiciary should be implemented through amendment of the Agency Practice Act's enforcement provisions. Congress should amend the Act to provide that no federal agency has authority to discipline attorneys practicing before it except for reciprocity hearings and hearings to adjudicate alleged misconduct affecting the order or integrity of a proceeding, the sanction for which does not extend beyond the duration of the proceeding. In all other instances the agency should be required to file charges and supporting documents of alleged attorney misconduct with the appropriate federal district court. If the court determines further proceedings are warranted,²¹⁵ the agency should present the case in chief.²¹⁶ In addi-

212. See *supra* notes 33-46 and accompanying text.

213. See *infra* appendix A, question 17; *supra* note 13.

214. See *supra* note 94.

215. Some observers have recommended promulgation of uniform procedures to aid federal district courts in adjudicating attorney misconduct. See, e.g., Franck Proposal, *supra* note 6, at 30-32. Such procedures are undesirable for two reasons. First, federal district courts currently have procedures for adjudicating attorney misconduct. Several, for example, have adopted the ABA's *Model Federal Rules of Disciplinary Enforcement*. ABA Standing Comm. on Professional Discipline & Center for Professional Discipline, *Model Federal Rules of Disciplinary Enforcement* (Feb. 14, 1978). Second, requiring or even recommending adoption of uniform rules would lessen the likelihood of judicial support for the use of federal district courts to adjudicate claims of attorney misconduct before federal agencies.

216. Congress should amend the Agency Practice Act by redesignating § 500(f) as § 500(g) and enacting the following language as new § 500(f):

(1) Except as provided by this subsection, no agency shall be authorized, two years after the effective date of this subsection, to adopt standards of conduct for persons qualified by subsection (b) or to impose discipline thereon for violation of any such standards.

(A) No agency shall promulgate standards of conduct for persons qualified by subsection (b) except as provided by 5 U.S.C. app. §§ 401-404 and by the reg-

tion, all disciplinary action taken, whether by the agency itself or

ulations adopted by the Office of Personnel Management in implementation thereof;

(B) An agency may discipline a person qualified by subsection (b) for conduct proscribed by the standards adopted pursuant to paragraph (A) above to the extent required to maintain order in or the integrity of a proceeding, provided the discipline imposed by the agency does not continue past the duration of the proceeding;

(C) An agency may conduct a reciprocity proceeding as provided in subsection (b) above; and

(D) Nothing in this subsection affects the authority of a State to regulate an individual described in subsection (b) above or of an agency which has express statutory authority (or which may be granted express statutory authority) to adopt standards of conduct for persons qualified by subsection (b) above, and to impose discipline thereon for violation of standards adopted under the agency's express statutory authority.

(2) In all other instances the district courts of the United States have jurisdiction to impose discipline on persons qualified under subsection (b) above for conduct proscribed by standards adopted pursuant to paragraph (1)(A) above.

(A) Allegations of proscribed conduct committed by a person qualified under subsection (b) above shall be presented by the agency to the court under seal with accompanying documents; the court shall determine in camera whether substantial evidence of proscribed conduct has been presented by the agency so as to warrant continuation of the proceeding. If the proceeding is not continued, the allegations and accompanying documents shall remain nonpublic and the proceeding shall be terminated. If the court determines that substantial evidence of proscribed conduct exists, the proceeding shall continue according to rules prescribed by the court. The burden shall be on the agency to sustain the allegation of proscribed conduct. If the court finds clear and convincing evidence that proscribed conduct has occurred, the court shall disbar, suspend, place on probation, or reprimand the person who has committed the proscribed conduct and may assess against that same person the costs of the proceeding, as well as order restitution to persons financially injured by the proscribed conduct, or both.

(B) The action may be brought in the district court of the United States for the district where the agency has its principal office; the conduct occurred; the person qualified by subsection (b) above maintains an office; the person qualified by subsection (b) above resides; or the person qualified by subsection (b) above is licensed to practice law. The court shall consider a request by the person against whom an action is filed for a change of venue. Review of discipline imposed by a federal district court under this subsection shall be in the appropriate United States court of appeals.

If Congress decides to apply the standards of conduct adopted pursuant to amended § 500(f)(1)(A) not only to attorneys practicing before federal agencies but also to government attorneys, *see supra* notes 161-64 and accompanying text & note 207, it should add the following language to amended § 500(f)(2)(A):

If the person alleged to have committed proscribed conduct is an employee or member of an agency, the complaint shall be made to the director of the Office of Government Ethics (or his designate), who shall assume responsibility for presenting the allegation of proscribed conduct and accompanying documents to the court and, if the proceeding is not terminated by the court, of presenting the case in chief.

The above change would also require amendment of Title IV, Ethics in Government Act, 5 U.S.C. app. §§ 401-04 (1982). *See supra* note 159.

In regard to the suggested amendment to 5 U.S.C. § 500(f)(2)(A), the administrative law standard of "substantial evidence" is more appropriate for the preliminary evaluation of evidence of proscribed conduct than the criminal law standard of "probable cause to believe that an offense has been committed" applicable to preliminary examinations. *See*

through the courts (except for reciprocity hearings), must be directly related to an alleged violation of the established standards of attorney conduct.²¹⁷

V. CONCLUSION

Effective regulation of attorneys practicing before federal agencies must address three separate aspects: admission requirements, standards of conduct, and disciplinary action. Longstanding, consistent precedent, both congressional and judicial, support the conclusion that Congress has authority to regulate attorneys practicing before federal agencies.²¹⁸ In exercising this authority, Congress has set a single admission requirement for practice before federal agencies.²¹⁹ Congress has not, however, adequately addressed the other two aspects of attorney regulation—standards and discipline. Although extensive misconduct by attorneys before federal agencies has not been documented to date, widespread inconsistencies in standards²²⁰ and disciplinary mechanisms²²¹ between the states, federal agencies, and other federal authorities expose attorneys to uncertain and conflicting potential liability.

Through amendment of the Agency Practice Act, Congress should delegate authority to promulgate uniform standards of conduct to an existing federal agency. Neither Congress nor the judiciary can provide the resources and apolitical atmosphere necessary to produce comprehensive and objective standards. In contrast, the Office of Government Ethics, currently under a broad congressional mandate to provide general guidance, standards of conduct, and advice to federal agencies, appears both equipped and appropriate to accept the specific task of promulgating uniform standards of conduct for attorneys practicing before federal agencies.

FED. R. CRIM. P. 5.1(a). "Clear and convincing evidence" is the standard most frequently applied in attorney disciplinary proceedings to determine whether proscribed conduct has been committed. 7A C.J.S. *Attorney & Client* § 103 (1980).

217. Presumably, these would include both the uniform standards and any additional standards promulgated by an individual agency and approved by the Office of Personnel Management. *See supra* note 159.

218. *See supra* notes 31–32.

219. *See* 5 U.S.C. § 500(b) (1982); *supra* notes 58–75 and accompanying text. Only the Patent and Trademark Office's admission requirements differ. *See id.* at § 500(e).

220. *See supra* notes 100–12 and accompanying text. Much of the confusion stems from ambiguous delegations of authority by Congress. *See supra* notes 113–43 and accompanying text.

221. *See supra* notes 177–90 and accompanying text.

Congress also should amend the Agency Practice Act to provide for a uniform disciplinary process. Except for attorney misconduct affecting only the integrity of a particular agency proceeding,²²² the agencies themselves are inappropriate disciplinary bodies. An agency responsible for both initiating and adjudicating charges of alleged attorney misconduct faces high risks of bias and conflict of interest. Furthermore, allowing each agency to discipline its own practitioners perpetuates the lack of uniformity among different agencies.

The federal district courts, currently vested with the authority to adjudicate attorney misconduct in general, are well-suited to adjudicate alleged violations of uniform standards of conduct for practice before federal agencies. The district courts would not be overburdened with a large caseload increase and would afford accused practitioners an unbiased and familiar forum in which to be heard. Until Congress expressly defines agency responsibilities relating to standards of conduct and discipline, the controversy between the bar and federal agencies on these matters is unlikely to disappear. The recommendations suggested above²²³ balance the concerns of attorneys and federal agencies, and also reflect a regard for the public's right to effective regulation of attorneys practicing in the federal administrative process.

222. Federal agencies also should retain authority to conduct reciprocity hearings. *See supra* notes 212-14 and accompanying text.

223. *See supra* notes 83, 94, 159, & 216.

APPENDIX A

Federal Questionnaire

Survey: Discipline of Attorneys Practicing Before Federal Agencies

This Survey of twenty (20) questions is intended to aid in making a recommendation to the Administrative Conference of the United States on issues relating to discipline of attorneys practicing before federal agencies. RESPONSE TO THIS SURVEY IS VOLUNTARY. You are probably aware that the American Bar Association and other groups and individuals are addressing themselves to the need for more effective control over attorneys practicing before federal agencies and to the problems raised by attorneys whose practice brings them into contact with forums other than the state of their original admission. This has raised questions of, *inter alia*, whether there should be uniform standards of professional conduct for attorneys practicing before federal agencies (above and beyond the Code of Professional Responsibility) and whether current disciplinary procedures are adequate. This Survey is designed to obtain your reactions and opinions on issues related to these questions and to obtain information derived from your experience with respect to the issues involved. Please feel free to comment on any matter related to the subject of inquiry even if the issue is not presented by a specific question.

Requirements for Admission to Practice

1. Should attorneys practicing before your agency be subject to admission requirements beyond those required by "The Agency Practice Act," 5 U.S.C. § 500, i.e., should the Act be amended?

Yes _____ No _____

2. If additional admission requirements were imposed, what type of requirements (if any) would be appropriate with regard to your agency? PLEASE EXPLAIN ON SEPARATE SHEET.

Standards of Professional Conduct

3. Has your agency promulgated particularized standards of practice relating to professional conduct?

Yes _____ (Please explain on separate sheet) No _____

4. If your agency does NOT have particularized standards, do you think they would be desirable for your agency?

Yes _____ No _____ Question

Not Applicable _____

5. If your agency DOES have particularized standards, do you think they are desirable?

Yes _____

No _____

Question

Not Applicable _____

6. If particularized standards exist [or were to be promulgated] for your agency, what considerations require [would require] your agency to impose particularized standards? PLEASE EXPLAIN ON SEPARATE SHEET.

7. Should different professional standards apply depending on whether the alleged misconduct arises out of a direct appearance before an agency (e.g., actually appearing before the agency; filing a document the contents of which were prepared by the attorney; and the like) or does not arise out of a direct appearance (e.g., failure to "blow the whistle" on a corporate decision)?

Yes _____

No _____

8. Should uniform standards of professional conduct for federal agency practice be promulgated?

Yes _____

No _____ (Please answer Questions 9 & 10, even if you answered No)

9. By whom should any such uniform standards of professional conduct for federal agency practice be promulgated?

ABA _____ Federal Courts _____ Congress _____

Ad Hoc Group (Attorneys) _____

Ad Hoc Group (Agency Personnel) _____

Ad Hoc Group (Attorneys/Agency Personnel) _____

Other _____ (please explain on separate sheet)

10. Should any agencies be exempted from any such uniform standards of professional conduct for federal agency practice?

Yes _____ (Please explain on separate sheet) No _____

Attorney Discipline

11. Do you feel that current procedures used by your agency effectively process and resolve misconduct by attorneys practicing before your agency?

Yes _____

No _____ (Please explain on separate sheet)

12. How does your agency process complaints against attorneys practicing before your agency?

Forward to Licensing State _____

In-House Agency Proceedings _____

Other _____ (Please explain on separate sheet)

13. Are you in favor of the creation of a centralized federal authority to handle discipline of attorneys practicing before federal agencies?

Yes _____

No _____ (Please answer Questions 14-17, even if you answered No)

14. Whom should such a centralized authority use to screen and investigate a complaint arising out of misconduct before your agency?

US Attorney _____

Your Agency _____

Licensing Bar Counsel _____

Federal Magistrate _____

Federal Judge _____

The Centralized Authority _____

Other _____ (Please explain on separate sheet)

15. Whom should such a centralized authority use to dispose of a screened/investigated complaint arising out of misconduct before your agency, to include imposing discipline (if appropriate)?

US Attorney _____

Your Agency _____

Licensing Bar Counsel _____

Federal Magistrate _____

Specially Designated ALJ _____

Federal Judge _____

The Centralized Authority _____

Other _____ (Please explain on separate sheet)

16. Should any agencies be exempted from such a centralized authority for attorney discipline?

Yes _____ (Please explain on separate sheet) No _____

17. Should attorneys sanctioned (e.g., suspension, disbarment) for misconduct before your agency be similarly restricted in their practice before all federal agencies?

Under a centralized federal authority approach:

Yes ___ No ___

Under an agency-by-agency approach:

Yes ___ No ___

Under a state licensing authority approach:

Yes ___ No ___

18. With respect to your agency, misconduct by attorneys arises:

Regularly _____ Periodically _____
Occasionally _____ Almost Never _____

19. Approximately how many instances of attorney misconduct (of such a nature as to warrant sanction) occur annually before your agency? _____; Are the attorneys involved generally sanctioned? Yes _____ No _____ (Please explain on separate sheet)

20. What types of misconduct occur most frequently before your agency? PLEASE EXPLAIN ON SEPARATE SHEET.

Name of Agency _____ Position Held _____

Thank you for your assistance in this matter. Please return this Survey (and additional pages needed for explanation) by June 15, 1982, in the self-addressed envelope provided.

Sincerely,
Michael P. Cox

APPENDIX B
State Questionnaire
Survey

This Survey of eleven (11) questions is intended to aid in making a recommendation to the Administrative Conference of the United States (5 U.S.C. §§ 571-576) on issues relating to discipline of attorneys practicing before federal agencies. RESPONSE TO THIS SURVEY IS VOLUNTARY. The information being solicited is not available from the National Center for Professional Responsibility (and other sources contacted). You are probably aware that the American Bar Association and other groups and individuals are addressing themselves to the need for more effective control over attorneys practicing before federal agencies and to the problems raised by attorneys whose practice brings them into contact with forums other than the state of their original admission. This has raised questions of, *inter alia*, whether there should be uniform standards of professional conduct for attorneys practicing before federal agencies (above and beyond the Code of Professional Responsibility) and whether current disciplinary procedures are adequate. This Survey is designed to obtain information with respect to the issues involved. Please feel free to comment on any matter related to the subject of inquiry even if the issue is not presented by a specific question.

1. You have authority to investigate, discipline, etc. an attorney licensed to practice by your State, without regard to whether misconduct occurs *within* or *without* your State.

True _____ False _____ (Please explain on separate sheet).

2. You *only* have authority to investigate, discipline, etc. an attorney licensed to practice by your State for a violation of a standard adopted by some official body (e.g., court, legislature, bar association) of your State.

True _____ False _____ (Please explain on separate sheet).

3. You have authority to investigate, discipline, etc. an attorney NOT licensed to practice by your State (but who has her/his principal office in your State) for misconduct which occurs *without* your State.

True _____ False _____.

4. You have authority to investigate, discipline, etc. an attorney

NOT licensed to practice by your State for misconduct which occurs *within* your State.

True _____ False _____.

5. If you have authority to investigate, discipline, etc. an attorney NOT licensed to practice by your State for misconduct, which occurs *within* your State, the investigation, discipline, etc. would be for a violation of a standard adopted by

Your State _____ The Licensing State _____

Both _____ Other _____ (Please explain on separate sheet)

Question Not Applicable _____

6. If you have authority to investigate, discipline, etc. an attorney NOT licensed to practice by your State (but who has her/his principal office in your State) for misconduct which occurs *without* your State, the investigation would be for a violation of a standard adopted by

Your State _____ The Licensing State _____

The State Where Misconduct Occurred _____

Other _____ (Please explain on separate sheet)

Question Not Applicable _____

7. Does your State realistically have the interest, resources, etc. to pursue [pursue vigorously?] misconduct relating to federal agencies committed *within* your State by attorneys licensed to practice by your State?

Yes _____ No _____ (Please explain on separate sheet)

8. Does your State realistically have the interest, resources, etc. to pursue [pursue vigorously?] misconduct relating to federal agencies committed *without* your State by attorneys licensed to practice by your State?

Yes _____ No _____ (Please explain on separate sheet)

9. If you have authority to investigate, discipline, etc. an attorney NOT licensed to practice by your State,

a. does your State realistically have the interest, resources, etc. to pursue [pursue vigorously?] misconduct relating to federal agencies committed *within* your State by attorneys NOT licensed to practice by your State?

Yes _____ No _____ (Please explain on separate sheet)

Question Not Applicable _____.

b. does your State realistically have the interest, resources, etc. to pursue [pursue vigorously?] misconduct relating to fed-

eral agencies committed *without* your State by an attorney NOT licensed to practice by your State (but who has her/his principal office in your State)?

Yes _____ No _____ (Please explain on separate sheet)

Question Not Applicable _____.

10. Does your State have reciprocal discipline arrangements with:

a. other states?

Yes _____ (Please explain on separate sheet); No _____.

b. federal agencies?

Yes _____ (Please explain on separate sheet); No _____.

11. In addition to answering the ten (10) general questions, above, information is solicited on the number and disposition of complaints you have received in recent years relating to federal agencies. [The time period is left to your discretion, but at least the past five years is desirable.] Obviously, the names (or other identifying particulars) of the individuals involved are not being sought but rather "anonymous" data, to include, if possible, items of information such as: year, source of the complaint (e.g., private source or SEC, Treasury, Army JAGC, or the like), nature of the complaint, and the disposition/sanction (if any) imposed. The format, below, is suggested for the data:

Date	Source	Nature of Complaint	Disposition/Sanction	
			Private	Public
_____	_____	_____	_____	_____

(continue on additional sheet(s) if required)

Name of State _____ Position Held _____

Thank you for your assistance in this matter. Please return this Survey (and additional pages needed for explanation) as soon as possible, but not later than June 28, 1982, in the self-addressed envelope provided.

Sincerely,
Michael P. Cox

APPENDIX C
Attorney Misconduct Before Eleven Federal Agencies
ABA Center For Professional Responsibilities
March 10, 1982

	<i>Approximate Number of Lawyer Discipline Cases Per Year</i>	<i>Has Agency Referred Lawyer Discipline Cases to State Agencies</i>	<i>Has Agency Been Satisfied With State Agencies' Handling of Cases</i>	<i>Number of Lawyer Discipline Cases Handled by Agency in 1981</i>
1. Civil Aeronautics Board	One case every several years	No	—	0
2. Federal Trade Commission	One case every two years	One case in past five years	No idea what happened with case; never heard anything form state	0
3. Interstate Commerce Commission	Ten cases per year	Yes - over past six months have referred all their cases	Extremely pleased thus far	2
4. Office of Personnel Management	Never had a case	No	—	0
5. Securities And Exchange Commission	Thirty-five cases per year investigated; one per year goes to administrative proceeding	About fifteen cases in past five years	Pleased with some states, displeased with others	5-6
6. Department of Treasury	Fifty cases per year	No	—	about 50
7. Nuclear Regulatory Commission	One case every four years	No	—	0
8. Department of Justice	No response	No	—	0
9. National Labor Relations Board	18-20 in 55 years; all for misconduct in hearings	No	—	0
10. Department of Energy	Never had a case	No	—	0-(DOE) (Federal Energy Regulatory Commission-FERC) - 2 reprimands
11. Federal Communications Commission	Two cases within last five years	No	—	0

APPENDIX D
Selected Bibliography

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